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UNITED STATES CIRCUIT COURTS OF APPEALS REPORTS

WITH ANNOTATIONS

WITH TABLE OF CASES IN THE UNITED STATES CIRCUIT COURTS OF APPEALS IN WHICH REHEARINGS HAVE BEEN GRANTED OR DENIED

106-107 F.

VOLUME 46

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OF THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

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[1] Appointed March 29, 1901, under act approved March 2, 1901.

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[2] Appointed April 24, 1901, under act approved February 12, 1901.
[3] Appointed March 8, 1901.

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS.

(105 Fed. 996.)

HAGERMAN v. NORTON.

(Circuit Court of Appeals, Fifth Circuit. January 15, 1901.)

No. 1,006.

1. SHIPPING—DEMURRAGE—LOADING CARGO—STOPPAGE OF LABOR.

Where a charter provided that a certain number of working days should be allowed for loading the vessel, detention caused by strikes or "estoppage of labor" not included, days on which those loading the vessel refused to work owing to storms, and days when the labor organizations withdrew their members to attend a funeral and for the celebration of Labor Day, should not be excepted from the days allowed for loading; all days save Sundays and legal holidays being working days, and there having been no forced stoppage, within the meaning of the charter party.[1]

2. SAME—CUSTOM OF PORT.

Where a charter party provided that 14 working days should be allowed for loading the vessel in the port of Pensacola, and that the custom of each port was to be observed in all cases, and the vessel was delayed more than 14 working days owing to the members of labor organizations refusing to work on days generally recognized as working days, a contention that, the practice of such labor organizations being known to ship owners, the delay should be excused, under the clause relative to customs of ports, was without merit, since the custom of labor organizations in the port of Pensacola, and their manner of refusing to work, being known to the charterer of a ship, if he wished to protect himself from the results of their refusal to work on days generally regarded as working days he should so provide in his charter party.

3. SAME—DUTY OF CHARTERER.

Where a charter provided that a vessel should proceed to Pensacola and there load, the cargo to be delivered alongside, and that 14 working days should be allowed the charterers for loading the vessel, a contention that under the terms of the charter party the duty of the charterer was ended when the cargo was delivered alongside, and that all delays in loading and stowing the cargo were at the risk of the ship owner, was without merit.

Appeal from the District Court of the United States for the Northern District of Florida.

[1] See note at end of case.

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Libel by Charles W. Hagerman against Benjamin Norton to recover demurrage under a charter party. From a decree in favor of libelant, libelee appeals. Affirmed.

B. C. Tunison, S. M. Loftin, B. S. Liddon, and John Eagan, for appellant.

W. A. Blount and A. C. Blount, Jr., for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. This is a libel to recover demurrage under a charter party which contains provisions as follows:

"That the said vessel shall with all convenient speed sail and proceed to Pensacola, * * * there load (always afloat) from the said merchants, * * * as they may direct, a full and complete cargo, to consist of pitch-pine sawn timber. * * * Sufficient suitable timber and/or deals and/or boards, at merchants' option, to be supplied for beam fillings and stowage as required by master. * * * Loss, damage, or detention by the act of God, restraint of princes and rulers, public enemies or people, quarantine, epidemics, pirates or robbers, barratry of the master or crew, fire from any cause or wheresoever occurring, perils of the sea or other waters, riots, strikes, or estoppage of labor, or lockouts of seamen or shore laborers, whether partial or otherwise, and any consequence thereof, * * * or any other extraordinary occurrence beyond the control of either party, always mutually excepted. * * * The cargo to be delivered alongside at merchants' risk and expense, secured by dogs and chains, and to be received by the master, and when so delivered to be then at ship's risk. The ship to discharge each lighter having lumber for cargo or broken stowage without unreasonable detention. Should the master order more timber or deals or boards alongside than the ship requires for loading, the expense of returning it to the booms to be paid by the ship. * * * Fourteen working days are to be allowed charterers or their agents for loading the vessel, which time is to commence on the day after the vessel is ready (in loading berth) to receive cargo, and written notice given of same to charterers or their agents, but days for discharging shall be according to the custom of the port of discharge. Should the cargo not be delivered to the vessel at port of loading, or received at port of discharge, within the specified time, by default of charterers or their agents, for each and every day over and above said lay days charterers or their agents are to pay the sum of sixpence sterling per net register ton demurrage; any detention through quarantine not to count in lay days. * * * Charterers or their agents to appoint and pay the stevedore to do the stowing of the cargo under the supervision of the master. * * * Cargo to be delivered to vessel at port of loading alongside, and to be taken from alongside at port of discharge, always within reach of ship's tackle, and at merchants' risk and expense, vessel always being afloat. * * * The custom of each port to be observed in all cases where not specially expressed. * * *"

There is no dispute that the ship was detained in loading 6 days beyond the 14 days, exclusive of Sundays and legal holidays, and demurrage for these 6 days was allowed in the court below. The first contention is that these extra 6 days should not be allowed, because thereon there was a stoppage of labor, as on three the baymen engaged in loading the vessel stopped and refused to work because of storms existing in the Bay of Pensacola; on another the said baymen so employed refused to work for the reason that on that day the funeral was to take place of a deceased bayman, and on this day the said labor organizations compelled and required all the baymen engaged in loading timber in the Bay of Pensacola to leave and quit their work, and there was by reason of the action of said labor or-

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ganizations a general stoppage of labor in the Bay of Pensacola on said day; and on another the labor organizations withdrew all their members from work in stowing vessels for the purpose of celebrating the said day as Labor Day, so called by them; and all the laborers engaged there on the said day refused to labor thereon, and no labor was done by said baymen on said day, or on any vessel in said port, and the action of said labor organizations did on this day bring about a general stoppage of labor. It is further contended that the existence of labor organizations, and their customs and practices in regard to the manner in which they work in stowing vessels in the port of Pensacola, and their arbitrary manner of refusing to work, are well known to libelant and ship owners generally whose ships come to the port of Pensacola, wherefore it is contended that, under the provision of the charter party that "the customs of each port to be observed in all cases where not specifically expressed," excuses the respondent for the delay in question. It is well settled that the term "working days," as ordinarily used in charter parties, excludes Sundays and holidays, but not rainy nor stormy days. Pedersen v. Eugster (D. C.) 14 Fed. 422; Wood v. Keyser (D. C.) 84 Fed. 692. In the last-cited case the charter party contained not only the provision that "the act of God, * * * floods, droughts, * * * riots, strikes, or stoppage of labor, * * * or any other extraordinary occurrence beyond the control of either party, were always mutually excepted," but the further provision that "in the computation of the days allowed for delivering and receiving the cargo shall be excluded any time lost by reason of fire, droughts, floods, storms, strikes, lockouts, combinations of workmen, or any extraordinary occurrence beyond the control of the charterers or the receivers of the cargo"; and yet the district court held, and the same was afterwards affirmed in this court, as follows:

> "As to the other causes of delay, to wit, the funeral of the bayman, the day occupied in putting up the tackle for loading the vessel, and for cessation of work on Good Friday, it appears that these days do not fall within the exceptions of the charter party, as, properly speaking, they are 'working days,' which term includes all days except Sundays and legal holidays; and I am of the opinion that the custom of baymen to cease labor on these days, as set forth in the answer, is not such a stoppage of labor as was contemplated by the charter party."

We think that this ruling, in principle, covers the case of Labor Day, which was conceded not to be a legal holiday. The days on which the baymen refused to work because of storms which prevailed in the port of Pensacola are clearly not days excepted under any provision of the charter party, as the baymen certainly did not quit because of any strike or forced stoppage of labor. We are of opinion that with regard to the customs and habits of the labor organizations in the port of Pensacola the charterers of ships are as well informed as the owners, and if either wishes to protect himself from any of the peculiar results occasioned by organized labor, and thus derogate from the established rule as to working days, let him specifically provide for it in the contract.

The other contention of the appellant in this case is that under the terms of the charter party the duty of the charterers was ended when

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the cargo was delivered alongside, and that all delays in loading and stowing cargo aboard are at the risk of the ship owner. A recital of the various provisions of the charter party above quoted is a sufficient answer to this contention. A similar charter party was considered in the case of The Assyria, 39 C. C. A. 97, 98 Fed. 316, and it was held:

"Where a charter party provided that a cargo of lumber should be loaded by the charterer, and should be 'furnished' at the average rate of 50,000 superficial feet per running day, the lay days for loading are to be computed on the amount actually loaded, and not upon the amount delivered to the vessel for loading, a part of which was not actually loaded."

As we find no error in the record, the decree of the district court is affirmed.

NOTE.

Demurrage.[1]

1. Nature of Liability.

[a] (U. S. Sup., N. Y., 1897) It is not the mere fact that a vessel is detained that entitles the owner to demurrage. There must be a pecuniary loss, or at least a reasonable certainty of pecuniary loss, and not a mere inconvenience arising from an inability to use the vessel for the purpose of pleasure.—The Conqueror, 17 Sup. Ct. 510, 166 U. S. 110, 41 L. Ed. 937, reversing (D. C. 1892) 49 Fed. 99.

[b] (U. S. C. C. A., N. Y., 1891) On a claim of demurrage it was shown that neither the charter nor the bill of lading contained any provision as to demurrage. The master made no formal protest against the delay, but signed without objection the bill of lading, and did not bring suit until long after. *Held*, that demurrage could not be recovered.—McKeen v. Morse, 1 C. C. A. 237, 49 Fed. 253.

[c] (U. S. D. C., N. Y., 1893) Demurrage is an extended freight or reward to a vessel in compensation of the earnings she is caused to lose improperly. —The J. E. Owen, 54 Fed. 185.

[d] (N. Y. City Ct. 1899) Compensation may be recovered by the owner of a vessel for unreasonable detention thereof, though the bill of lading contain no demurrage clause.—Jameson v. Sweeney, 61 N. Y. Supp. 498, 29 Misc. Rep. 584.

2. Construction of Charter Party or Bill of Lading.

[a] (U. S. C. C. A., Cal., 1894) A charter party provided for demurrage for detention of the vessel by default of the charterer excepting detentions caused by political occurrences. *Held*, that political occurrences which prevented the charterer from procuring a cargo, but not from loading any cargo he might procure, did not relieve him from liability for demurrage. —Sixteen Hundred Tons of Nitrate of Soda v. McLeod, 10 C. C. A. 115, 61 Fed. 849.

[b] (U. S. C. C. A., Fla., 1898) A charter provided for demurrage, but a "cessor clause" therein provided that "the charterer's responsibility under this charter shall cease as soon as the cargo is shipped and bills of lading signed, provided all the conditions called for in this charter have been fulfilled or provided for in the bill of lading." The charter also provided that bills of lading should be signed as presented without prejudice to the charter party, but any difference of freight was to be settled on signing the bills of lading. *Held*, that the signing of bills of lading did not operate to release the charterers from liability for demurrage accruing prior to the signing of the bills, from their failure to fulfill the conditions of the charter. —Schmidt v. Keyser, 32 C. C. A. 121, 88 Fed. 799; Keyser v. Schmidt, Id.

[c] (U. S. C. C. A., Mass., 1895) When, in the charter party, Sundays only are excepted from running days, the charterers are not exempt from de-

[1]Supplementary to note to Randall v. Sprague, 21 C. C. A. 337.

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murrage for holidays and days on which laborers will not work.—James v. Brophy, 18 C. C. A. 49, 71 Fed. 310.

[d] (U. S. C. C. A., Minn., 1896) Where the time for the discharge of a vessel is stipulated in the charter or bill of lading, or is definitely fixed by it, so that it can be calculated beforehand, the charterer thereby agrees to discharge her within that time, and he takes the risk of all unforeseen circumstances.—Empire Transp. Co. v. Philadelphia & R. Coal & Iron Co., 23 C. C. A. 564, 77 Fed. 919, 35 L. R. A. 623, affirming (D. C. 1895) 70 Fed. 268.

[e] (U. S. D. C., Mass., 1898) A charter party for a vessel to be loaded with lumber provided that "the lay days for loading or discharging shall be as follows (if not sooner dispatch), commencing one clear day from the time the captain reports his vessel ready to receive or discharge cargo: * * * Loading with all possible dispatch, but not less than 25 M feet daily. * * * The cargo or cargoes to be * * * delivered according to custom of the port of discharge." *Held*, that such contract did not expressly provide for the rate of discharge at 25 M feet daily.—The James Baird, 90 Fed. 669; Cottingham v. Abbott, Id.

[f] (U. S. D. C., N. Y., 1896) Claimants had for several years adopted the custom of chartering vessels late in the autumn, loading them with grain at Chicago, and having them lay up at Ogdensburg, N. Y., during the winter. Libelant's agent had applied to claimants in November to charter boats for Ogdensburg for the winter, at an advance on ordinary rates, and had chartered several. In chartering the last boat, nothing was said about her being held during the winter, but the agent knew that she could not be promptly unloaded, and received the advanced rates as for those previously chartered. *Held*, that libelant was bound by the agreement made respecting the other vessels, and claimants were not liable for demurrage for holding the boat last chartered.—Green v. Cargo of the Lewiston, 77 Fed. 321.

[g] (U. S. D. C., N. Y., 1899) A special provision of a charter party that the freight on the dressed lumber shipped should be subject to a deduction of one-fifth cannot extend to the construction of maritime rules relating to demurrage, so as to entitle the consignee to a deduction in measurement for dressed lumber in computing the demurrage due, except on clear evidence that it was so intended.—Bowen v. Sizer, 93 Fed. 227.

[h] (U. S. D. C., N. Y., 1900) A provision, in a charter for carrying a cargo of lumber, that the cargo should be furnished "as fast as vessel can receive and properly stow same in suitable hours and weather," has reference to the hours and weather suitable for loading and stowage, and does not exclude time lost by reason of the lumber becoming wet in distant yards, and unfit for loading, before it is forwarded to the ship.—Durchman v. Dunn, 101 Fed. 606.

[i] (U. S. D. C., Pa., 1899) A provision of a charter for quick delivery on board should be given a reasonable interpretation with reference to the character of the cargo, as well as its destination and the manner of stowage required, in order to facilitate its discharge. A requirement that the cargo shall be delivered as fast as the ship can receive it does not render the charterer liable for demurrage because all her hatches are not used at the same time, where the size and weight of the packages and the facilities of the wharf are such as to render such use inconvenient.—Uren v. Hagar, 95 Fed. 493.

3. Liability of Charterer or Shipper.

[a] (U. S. C. C. A., Mass., 1895) Where a cargo is to be delivered within reach of the ship's tackles, the charterers are not exempted from demurrage by a breakdown of one of the lighters.—James v. Brophy, 18 C. C. A. 49, 71 Fed. 310.

[b] (U. S. C. C., Me., 1880) Where parties chartered a vessel which was to be got ready by a certain date, it was held not a violation of the contract, entitling the owners to damages for demurrage, to load another vessel first, where the terms of the contract made no definite statement of the time for completion or the loading of the vessel.—Kimball v. Tudor Co., 2 Fed. 51.

[c] (N. Y. Sup. 1898) Where a shortage in a cargo of coal was due to the carrier's negligence, the shipper cannot be held for demurrage due to delay

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in arriving at a new agreement with the consignee for the acceptance of the short cargo at its actual weight.—Doherty v. Peal, Peacock & Kerr, 54 N. Y. Supp. 1054, 25 Misc. Rep. 487.

4. Liability of Consignee.

[a] (U. S.) A bill of lading provided that "48 hours after arrival in port, and notice thereof to the consignee, there shall be allowed for receiving cargo at the rate of one day for every 75 tons thereof, after which the cargo consignee shall pay demurrage at the rate of six cents per ton. * * * After arrival and notice as aforesaid, and the expiration of said 48 hours, said vessel shall have precedence in discharging over all vessels arriving, or giving notice, after her arrival; and for any violation of this provision she shall be compensated in demurrage," etc. *Held*, that the consignee has control of the ship hereunder as regards time and place of discharge, and is liable in demurrage for delay beyond the stipulated time on account of his failure to provide her a berth.—(C. C. A., N. Y., 1893) Smith v. M. Block Co., 5 C. C. A. 672, 56 Fed. 527; (D. C., N. Y., 1892) Smith v. Block Co., 56 Fed. 525.

[b] (U. S. C. C., Ill., 1883) Where the shipper of coal on a schooner expressed some doubts as to the depth of water at a certain dock at the port of delivery being sufficient to admit of the delivery of the coal at that dock on account of the size of the schooner, but the captain took the chances of there being sufficient depth of water there, and on arrival it was discovered that delivery could not be made at such dock, the captain can lay no claim for demurrage for delay caused by the necessity to proceed to another dock, or for expenses in consequence of the delay.—One Hundred Tons of Coal, 14 Fed. 878.

[c] (U. S. D. C., Pa., 1887) When the duty of providing a wharf at which to unload is on the consignee, he is entitled to reasonable notice of the time when the vessel will be ready to unload; otherwise, demurrage will be allowed only after the lapse of a reasonable time from actual notice.—The Rocky City, 33 Fed. 556.

[d] (N. Y. Sup. 1896) A consignee of lumber, shipped to him under an executory contract to purchase, is not liable for demurrage, where the delay was due to his refusal to accept the lumber without an abatement of price, because it was not of the specified quality.—Conkling v. Lumber Co., 41 N. Y. Supp. 801, 10 App. Div. 404.

5. Delay in Loading or Sailing.

[a] (U. S. C. C. A., Ill., 1900) Libelants contracted to carry, in their own or substituted vessels, from Escanaba to South Chicago, the ore required by respondent for its iron furnaces during the season, not to be less than 90,000 tons, and to be divided as evenly as possible during the season of navigation. Respondent contracted to do the unloading at its dock, and for dispatch therein, but the contract contained no provision for dispatch at the port of shipment; it being understood that respondent was obliged to procure the ore there from other parties. It subsequently contracted with two companies, operating mines connected by rail with Escanaba, to supply the ore at that port, and notified libelants to ascertain from them when cargoes were ready for shipment. *Held*, that there was no implied term of such contract requiring respondent to supply cargoes for loading at any particular time, or which rendered it liable for demurrage because of the delay of libelants' vessels while waiting for cargoes.—Corrigan v. Furnace Co., 41 C. C. A. 102, 100 Fed. 870.

[b] (U. S. D. C., N. Y., 1880) A vessel was loaded with laths in New Brunswick for New York under a charter specifying that she was to be loaded "with all possible dispatch." She was compelled to await her turn for cargo, and was thereby detained five days, and was also detained by tide and also at the place of discharge. *Held*, that demurrage could be allowed only for the detention in loading.—Moody v. Five Hundred Thousand Laths, 2 Fed. 607.

[c] (U. S. D. C., Pa., 1899) The Pennsylvania statute relating to holidays (Act 1893; P. L. 188) does not make them obligatory, and, where it is not shown that the stevedore or men engaged in loading a vessel refused to

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work on holidays, such days are not to be excluded in computing demurrage. —Uren v. Hagar, 95 Fed. 493.

6. *Delay in Unloading.*

[a] (U. S. C. C. A., Minn., 1896) Where the charter or bill of lading is silent as to the time of unloading and discharge, there is an implied contract to discharge the vessel within a reasonable time.—Empire Transp. Co. v. Philadelphia & R. Coal & Iron Co., 23 C. C. A. 564, 77 Fed. 919, 35 L. R. A. 623, affirming (D. C. 1895) 70 Fed. 268.

[b] (U. S. C. C. A., Minn., 1897) Where, by the bill of lading, the cargo is to be delivered "free of handling" at the private dock of a consignee known to have special facilities for unloading, the vessel will be entitled to demurrage for unnecessary delay of the consignee in beginning the discharge, although the total time consumed, including the delay, is not longer than would have been occupied in discharging at a public dock of the same port with the inferior facilities there afforded.—Fuel Co. v. McBrier, 28 C. C. A. 466, 84 Fed. 495.

[c] (U. S. C. C. A., N. Y., 1896) The master or shipowner cannot recover demurrage, under a charter party, for delay in discharging caused by the master's absence from the vessel, so that she could not be moved to another dock upon the purchaser of the cargo refusing to receive it on the ground that it was in bad condition.—Whitman v. Vanderbilt, 21 C. C. A. 422, 75 Fed. 422.

[d] (U. S. D. C., Mass., 1898) Where a bill of lading for a cargo requires its delivery to the consignee "or assigns," the master knows that the wharf of discharge may not have been selected; and the fact that the consignee sells the cargo before its arrival, and designates the wharf of the buyer as the place for its discharge, does not change the rule as to demurrage for delay in being provided a place to discharge.—The Viola, 90 Fed. 750; Forsyth v. Stetson, Id.

[e] (U. S. D. C., N. J., 1898) If the master, after beginning to unload, intends to discontinue until security is given for demurrage, he should give such timely notice thereof as will enable the charterers to furnish the required security without delaying the progress of the work, or adopt a means by which prompt discharge can be made and the lien of the vessel retained. —In re Ten Thousand and Eighty-Two Oak Ties, 87 Fed. 935.

[f] (U. S. D. C., N. Y., 1881) A captain is not entitled to demurrage for time lost in waiting to avail himself of a consignee's special facilities for unloading.—McLaughlin v. Steel Co., 8 Fed. 447.

[g] (U. S. D. C., N. Y., 1896) Libelant's vessel reached Ogdensburg December 4th, with a cargo of grain. December 9th was Sunday, and the canal through which she had to pass to reach the Upper Lakes was closed on the 11th. The only elevator at Ogdensburg was blocked, and five other vessels were ahead of libelant's, rendering it impossible to unload the latter before the canal closed. *Held*, that there was no negligence on the part of the charterers in detaining the vessel until the canal had closed.—Green v. Cargo of the Lewiston, 77 Fed. 321.

[h] (U. S. D. C., N. Y., 1896) Where the discharge of a scow laden with 252,500 brick was commenced on the 12th, and continued at the rate of 2,000 daily until the 20th, *held*, in the absence of a bill of lading or agreement for demurrage, that the master was justified in giving notice on that date that the discharge must be completed by the 25th, and that demurrage would be claimed thereafter.—Young v. One Hundred and Forty Thousand Hard Brick, 78 Fed. 149.

[i] (U. S. D. C., Va., 1882) For delay in unloading not occasioned by any insufficiency of carts to receive the cargo, but by reason of the vessel delivering from but one hatch, when she might have used two, no demurrage is recoverable.—Ewan v. Tredegar Co., 88 Fed. 703.

[j] (N. Y. City Ct. 1899) The freighter is liable to the owner of a vessel for unreasonable delay in discharging the cargo, on failure of the consignee to pay therefor, notwithstanding an agreement between the consignor and consignee that the latter should unload.—Jameson v. Sweeney, 61 N. Y. Supp. 498, 29 Misc. Rep. 584.

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[k] (N. Y. City Ct. 1900) Where a bill of lading of a vessel's cargo was silent as to who was to furnish discharging facilities, no action for demurrage for delay in securing proper dockage would lie against the consignors, since the owner took the risk of finding such facilities.—Jameson v. Sweeney, 66 N. Y. Supp. 494, 32 Misc. Rep. 645.

7. —— *Customs and Usages.*

[a] (U. S. C. C. A., Minn., 1896) The charterer is not bound to discharge the vessel in the customary time, regardless of unforeseen obstacles and unusual circumstances.—Empire Transp. Co. v. Philadelphia & R. Coal & Iron Co., 23 C. C. A. 564, 77 Fed. 919, 35 L. R. A. 623, affirming (D. C. 1895) 70 Fed. 268.

[b] (U. S. D. C., Md., 1880) The custom of a port to stop discharging cargoes of brimstone when there is a high wind is not unreasonable.—Bertellote v. Part of Cargo of Brimstone, 3 Fed. 661.

[c] (U. S. D. C., Md., 1880) The owner of a vessel is bound by the customs of a port to which he contracts to carry a cargo, where the charter provides that "the cargo is to be brought alongside the vessel and taken away at the expense and risk of the charterers, according to the use and customs of the place of loading and discharging."—Bertellote v. Part of Cargo of Brimstone, 3 Fed. 661.

[d] (U. S. D. C., Mass., 1898) A custom of a port as to the rate of discharging a certain kind of lumber from a vessel, to govern the rights of parties under a contract otherwise indeterminate, must not only be established and reasonable, but also certain and definite. Such a custom cannot be found on testimony that the rate is "from 17,000 to 20,000" feet per day, or "from 25,000 to 30,000" feet. Such testimony can only establish the usual or average time for unloading, and is valuable only as showing the limits, under ordinary circumstances, of a reasonable rate of discharging lumber of that kind at such port, and does not obviate the necessity of considering the particular circumstances of each case.—The James Baird, 90 Fed. 669; Cottingham v. Abbott, Id.

[e] (U. S. D. C., Mass., 1898) Where the wharves at a port are not all equally convenient for the discharge of every sort of cargo, in the absence of a custom establishing a uniform rate, a reasonable rate of discharge is not necessarily the same at all wharves, and, while a wharf may be so inconvenient as to render the consignee responsible for the delay in discharging thereat, the reasonable convenience required is not the highest degree of convenience either imaginable or actually existing.—The James Baird, 90 Fed. 669; Cottingham v. Abbott, Id.

[f] (U. S. D. C., Mass., 1898) While, in the absence of qualifying circumstances, it is usual and customary at the port of Boston for a consignee to have a berth provided at which a vessel may discharge her cargo within 24 hours after her arrival, by the custom of the port the presence at the designated wharf of other vessels, which arrived earlier, is considered such qualifying circumstance, and in such case vessels are required to wait their turn to discharge without demurrage for the delay so caused. *Held*, that such custom was a reasonable one within reasonable limits, and under ordinary circumstances, and that a vessel loaded with lumber was not entitled to demurrage because of a delay of 15 days, caused by so waiting her turn to discharge, it not appearing that the wharf was too small for the ordinary business of the owner, nor that he willfully or negligently permitted a large number of vessels to collect for discharging at the same time.—The Viola, 90 Fed. 750; Forsyth v. Stetson, Id.

[g] (U. S. D. C., N. J., 1898) In a charter of a vessel to carry railroad ties a provision that from the time the vessel is reported ready not less than 1,500 ties shall be furnished per running day "for loading at port of loading, and prompt dispatch for discharging at port of discharge," entitles the ship to demurrage for delay in unloading caused by other vessels being previously at the consignee's dock, though, by the custom of the port, vessels are obliged to take their turn.—In re Ten Thousand and Eighty-Two Oak Ties, 87 Fed. 935.

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[h] (U. S. D. C., N. Y., 1896) An alleged custom that a carrier of brick must await the convenience of the vendee or subvendee in unloading, and that the master is bound to prevent putting on board inferior brick at the time of loading, *held* invalid, as unreasonable and indefinite.—Young v. One Hundred and Forty Thousand Hard Brick, 78 Fed. 149.

8. Wrongful Acts of Third Persons.

[a] (U. S. C. C. A., Minn., 1896) A strike of the employés of the charterer without grievance or warning, and an organized and successful effort on their part to prevent, by threats, intimidation, and violence, other laborers, who were willing to do so, from discharging a vessel, *held* to excuse a charterer for a delay of a week in the performance of that work.—Empire Transp. Co. v. Philadelphia & R. Coal & Iron Co., 23 C. C. A. 564, 77 Fed. 919, 35 L. R. A. 623.

9. Fault of Vessel or Owner.

[a] (U. S. C. C. A., Fla., 1899) Where, after a cargo was loaded, the master refused to sign the bill of lading presented by the charterer, on the ground that it was incorrect, but, after several days' delay, altered and signed the same, the charterer cannot be charged with demurrage for the time so taken. —The Assyria, 39 C. C. A. 97, 98 Fed. 316; Dernier v. H. Baars Co., Id.

[b] (U. S. C. C. A., Mass., 1896) The owner of a vessel cannot ordinarily retain the cargo for nonpayment of freight, and charge demurrage arising from such detention.—Wellman v. Morse, 22 C. C. A. 318, 76 Fed. 573.

10. Lay Days.

[a] (U. S. C. C. A., Fla., 1899) Where a charter party provided that a cargo of lumber should be loaded by the charterer, and should be "furnished" at the average rate of 50,000 superficial feet per running day, the lay days for loading are to be computed on the amount actually loaded, and not upon the amount delivered to the vessel for loading, a part of which was not actually loaded.—The Assyria, 39 C. C. A. 97, 98 Fed. 316; Dernier v. H. Baars Co., Id.

[b] (U. S. C. C. A., Fla., 1899) The object of providing in a charter party for one clear day after notice of the readiness of the vessel to receive cargo before the lay days shall commence is to allow the charterer such time for preparation, and, unless made so by the terms of the charter or custom of the port, Sunday is not to be counted as such a day, and, where notice of readiness is given on Saturday, the lay days do not commence until Tuesday.—The Assyria, 39 C. C. A. 97, 98 Fed. 316; Dernier v. H. Baars Co., Id.

[c] (U. S. C. C. A., Tex., 1899) A charter party fixed the demurrage for each day's detention of the vessel "by the default" of the charterers or their consignees. It made no provision for "dispatch" or "quick dispatch" in loading or discharging the cargo, but fixed the minimum amount to be loaded or discharged each day, and provided that the lay days should commence "from the time the captain reports himself ready to receive or discharge cargo." *Held*, that under the latter provision the lay days did not commence until the vessel was ready and in position to receive or discharge cargo, and that the contract did not bind the charterers for demurrage for a delay of the vessel in obtaining a wharf at which to discharge, notwithstanding a notice of readiness to discharge from the captain, where, as the owners knew or should have known, all the wharves at the port of destination were public, and under the exclusive control of a harbor master, who directed the movements and position of all vessels thereat, and by the rules of the port each vessel was required to wait her turn.—Flood v. Crowell, 34 C. C. A. 415, 92 Fed. 402.

[d] (U. S. D. C., Fla., 1897) The term "strike," in the exceptions to the running of lay days in a charter party, excuses the charterers for delay caused by a refusal of all the available workmen to work except for an advance in wages demanded in the midst of loading a vessel.—Wood v. Keyser, 84 Fed. 688, affirmed (1898) 31 C. C. A. 358, 87 Fed. 1007.

[e] (U. S. D. C., Fla., 1897) Days lost in putting up the gear of a vessel, preparatory to taking her cargo, being, under the terms of the charter party,

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a part of the charterer's duty, should be included in the lay days.—Wood v. Keyser, 84 Fed. 688, affirmed (1898) 31 C. C. A. 358, 87 Fed. 1007.

[f] (U. S. D. C., Fla., 1897) An exception of strikes from the running days provided in a charter party includes a strike brought about by demands of the charterers that the laborers loading the vessel shall conform to certain reasonable rules and regulations.—Steamship Co. v. Keyser, 84 Fed. 693, affirmed (1898) 31 C. C. A. 347, 87 Fed. 1005.

[g] (U. S. D. C., Fla., 1897) The fact that charterers have for some time acquiesced in certain unreasonable customs of baymen loading their ships is no waiver of their right to require the abandonment of such customs, and a strike resulting from such demand is within the exceptions in the charter party.—Steamship Co. v. Keyser, 84 Fed. 693, affirmed (1898) 31 C. C. A. 347, 87 Fed. 1005.

[h] (U. S. D. C., N. Y., 1899) Where two bills of lading were given requiring delivery of part of a cargo at different ports, they constitute independent contracts, and hence the consignee was entitled, under maritime rule 4, to one full calendar day after the vessel's arrival at the most distant port to furnish a berth for discharge before being liable for demurrage.—Bowen v. Sizer, 93 Fed. 227.

11. Burden of Proof.

[a] (U. S. C. C. A., Minn., 1896) Proof that the vessel was delayed in unloading beyond the customary time for discharging such cargoes at the port of her delivery throws upon the charterer the burden of excusing the delay by proof of the actual circumstances of the delivery and his diligence thereunder.—Empire Transp. Co. v. Philadelphia & R. Coal & Iron Co., 23 C. C. A. 564, 77 Fed. 919, 35 L. R. A. 623, affirming (D. C. 1895) 70 Fed. 268.

[b] (U. S. C. C. A., Minn., 1896) The burden is on him who seeks to recover damages for the failure to discharge a vessel in the customary time to prove that the charterer did not exercise reasonable diligence to discharge her under the actual circumstances of the particular case.—Empire Transp. Co. v. Philadelphia & R. Coal & Iron Co., 23 C. C. A. 564, 77 Fed. 919, 35 L. R. A. 623, affirming (D. C. 1895) 70 Fed. 268.

12. Rate and Amount.

[a] (U. S. D. C., N. Y., 1893) Interest is allowed on demurrage awarded for delay during negotiation in regard to repairs necessitated by collision.—Paul v. The M. Kalbfleisch and The Wm. Fletcher, 59 Fed. 198.

[b] (U. S. D. C., N. Y., 1899) Maritime rule 5 provides that the demurrage charge for delay of a vessel discharging a lumber cargo shall be at the rate of 15 cents per M. feet, board measure, of entire cargo delivered. *Held* that, in the absence of clear proof of a change in the custom, seven-eighths inch dressed boards will be treated as inch lumber, in determining the amount of the demurrage chargeable.—Bowen v. Sizer, 93 Fed. 227.

[c] (U. S. D. C., Ohio, 1897) The measure of damages for detention of a vessel, in loading or unloading, beyond the time stipulated in her charter, is the probable net earnings of such vessel during the period of her detention, and an inquiry into a subsequent period is inadmissible.—Barge Co. v. Turney, 79 Fed. 109.

13. Lien.

[a] (U. S. C. C. A., Minn., 1897) Discharging cargo after giving notice of a claim for demurrage is not a waiver of the lien, where such cargo is placed on the dock, and kept separate from other goods, so as to be capable of identification.—Fuel Co. v. McBrier, 28 C. C. A. 466, 84 Fed. 495.

[b] (U. S. C. C. A., Minn., 1897) The right of a vessel carrying cargo "free of handling" to a lien for demurrage for delay of the consignee in beginning to discharge is not affected by the fact that the delay arose from the refusal of the consignee to receive the cargo because damaged in transit by an excepted peril, and the fact that during the delay the consignee was negotiating with the owner to purchase the damaged cargo at a reduced price.—Fuel Co. v. McBrier, 28 C. C. A. 466, 84 Fed. 495.

[c] (U. S. D. C., Va., 1881) When cargo has been absolutely delivered to the consignee before service of process thereon, the lien for demurrage is lost.

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—Two Hundred and Sixteen Loads and Six Hundred and Seventy-Eight Barrels of Fertilizer, 88 Fed. 984.

[d] (N. Y. City Ct. 1900) Where the owner of a vessel delayed his action for demurrage for six years, the claim was stale.—Jameson v. Sweeney, 66 N. Y. Supp. 494, 32 Misc. Rep. 645.

[e] (Wis. Sup. 1897) The vessel has a lien on the cargo for demurrage, enforceable in admiralty.—Supply Co. v. Galvin, 71 N. W. 804, 96 Wis. 523.

14. Release.

[a] (U. S. C. C. A., N. Y., 1898) The consignees of the cargo of a vessel chartered by the consignors rendered an account to the agents of the owners of the vessel, in which they credited such owners with the freight, which was payable on delivery of the cargo, and paid the amount thereby shown, taking a receipt therefor. *Held*, that such settlement did not conclude the owners of the vessel as to a claim for demurrage which did not arise from any fault of the consignees, and for which they were not liable, but for which the consignors were liable under the terms of the charter party.—Burrill v. Crossman, 33 C. C. A. 663, 91 Fed. 543.

[b] (U. S. D. C., N. Y., 1900) A receipt in full for all claims under a charter executed by a master at the port of discharge on payment to him of only the freight due does not release the charterers from a claim for demurrage which was also made at the time by the master, and rejected, where the master was compelled to give such receipt in order to collect the freight, and did so under protest.—Durchman v. Dunn, 101 Fed. 606.

(106 Fed. 866.)

In re TOLLETT.

(Circuit Court of Appeals, Sixth Circuit. March 5, 1901.)

No. 898.

BANKRUPTCY—HOMESTEAD—VOLUNTARY CONVEYANCE—FRAUD—CONSTRUCTIVE—ACTUAL.

Where a debtor residing in Tennessee, shortly before filing his petition in bankruptcy, acting in good faith on the advice of his attorney, voluntarily conveyed his homestead to his wife, and afterwards, before his examination, receiving different advice, secured a reconveyance to himself, and on obtaining leave amended his schedule by including the homestead therein, such homestead should be set aside to the bankrupt in the bankruptcy proceedings, since the conveyance to his wife was not fraudulent in fact, and, as his creditors had no interest in or claim on his homestead interest in the land, the conveyance of such interest could not injure or be fraudulent as to them.

Petition for Revision of Proceedings in the District Court of the United States for the Eastern District of Tennessee.

Harvey Terry, for petitioner.

J. V. Lee, opposed.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

LURTON, Circuit Judge. The petitioner, a voluntary bankrupt, seeks to review the order of the district court denying him a homestead in land set out in his schedule as an asset. 105 Fed. 425. He is a citizen and resident of Tennessee, and is the head of a family. For many years he owned and occupied a small farm, valued at $1,000, which he claimed and held as a homestead under the homestead law

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of the state. This was the only land owned or claimed by him at the time of his bankruptcy. Within four months prior to his adjudication as a bankrupt he conveyed this land by a deed, in which his wife joined, to one Taylor, for the recited consideration of $500, but remained in possession. Shortly after his bankruptcy, and before examination, Taylor reconveyed same to petitioner, who thereupon applied for and obtained leave to amend his schedule, and include this land as an asset, and to claim a homestead therein. The referee denied this claim, and on request certified the question to the district judge, together with an agreed statement of the facts and his own finding. Upon this record the district judge affirmed the order of the referee. The ground upon which the right of homestead was denied was that under the Tennessee decisions a debtor was not entitled to a homestead in property recovered by his creditors which had been fraudulently conveyed by him, and that the reconveyance procured by the bankrupt after he had been adjudicated a bankrupt accomplished no more than would have resulted from a suit by the trustee in bankruptcy. The findings of the referee and the opinion of the district judge are reported in 105 Fed. 425, 427. The Tennessee constitution (article 11) provides that:

"A homestead in the possession of each head of a family and the premises therein, to the value, in all, of one thousand dollars, shall be exempt from sale, under legal process, during the life of such head of a family to inure to the benefit of the widow, and shall be exempted during the minority of their children occupying the same; nor shall said property be alienated without the joint consent of husband and wife, when that relation exists."

The homestead estate or interest is but an estate carved out of the fee for the life of the debtor, his widow, and his children during their minority. The homestead interest is the estate which is exempted from sale under legal process, and which can be conveyed only by the joint conveyance of husband and wife, where that relation exists. The remainder interest, subject to this homestead estate, is subject to sale by legal process to pay the debts of the owner of the fee. Flatt v. Stadler, 16 Lea, 371; Howell v. Jones, 91 Tenn. 403, 19 S. W. 757. The only land which the petitioner owned was the land in which he now claims a homestead. Inasmuch as its value did not exceed $1,000, no formal assignment of homestead in it was necessary. The homestead right attached to and covered the whole land and its improvements. Briscoe v. Vaughn, 103 Tenn. 308, 52 S. W. 1068. Neither does the right of homestead depend upon occupancy since the Tennessee act of 1879, for it constitutes, when assigned, a vested life estate, which passes under the deed of the owner in the same manner as any other life estate. Acts 1879, c. 171 (Shannon's Tenn. Code, §§ 3798, 3800); Cowan v. Carson, 101 Tenn. 523, 50 S. W. 742; Briscoe v. Vaughn, 103 Tenn. 308, 52 S. W. 1068. The only interest which was subject to the creditors of the petitioner was the remainder interest in the land in which he now asks a homestead. If the homestead estate was not subject to creditors, it is difficult to see how a conveyance limited to that estate could be fraudulent as to creditors. Leslie v. Joyner, 2 Head. 514. A voluntary conveyance of a homestead neither hinders nor prejudices

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creditors, and, whatever the motive of the grantor, creditors are not wronged, inasmuch as it was not subject to either legal or equitable process in their favor. Thomson v. Crane (C. C.) 73 Fed. 327; Fellows v. Lewis, 65 Ala. 343, 354. The difficulty is that the petitioner conveyed the entire fee, thereby including the remainder interest, which was subject to creditors. But does it follow that, because exempt and nonexempt property are joined in one conveyance, the creditors' rights are enlarged if the conveyance was a voluntary one? How a homestead may be acquired or lost must depend upon the law of the state under which the right of homestead arises. That law, as construed and applied by the highest court of Tennessee, constitutes a rule of property binding upon the federal courts in respect to homestead rights claimed in that state. Brashear v. West, 7 Pet. 608, 8 L. Ed. 801; Allen v. Massey, 17 Wall. 351, 21 L. Ed. 542; Bank v. Glass, 25 C. C. A. 151, 79 Fed. 706.

What, then, is the effect upon a debtor's right of homestead if he fraudulently convey the property in which he claims it? In Cowan v. Johnson, 2 Tenn. Cas. 41, it was held that, where the husband and wife joined in the execution of a conveyance which was fraudulent in fact, neither could claim a homestead in the property so conveyed when their deed had been set aside by creditors. In Ruohs v. Hooke, 3 Lea, 302, a transfer of a house and lot, occupied by the debtor to his wife, based upon love and affection, was held void as to existing creditors, because the husband had not retained property sufficient to provide for his existing liabilities. But upon application by the wife homestead was assigned in the property so recovered. Cowan v. Johnson was distinguished upon the ground that both husband and wife had participated in a conveyance which was fraudulent in fact. The case is a distinct authority for holding that the right of the wife to claim a homestead in property subject to the right of homestead is not forfeited when conveyed by the husband to the wife by a deed which is only constructively fraudulent. In Nichol v. Davidson Co., 8 Lea, 389, a conveyance by the husband to his wife was set aside for fraud, and the wife denied a homestead. The case was rested upon Cowan v. Johnson. The latest Tennessee case dealing with this subject is that of Rosenbaum v. Davis, decided since the decision in the court below, and reported in 60 S. W. 497. There a conveyance by the husband to the wife was set aside by creditors as fraudulent in law. The wife was held not to be estopped by her acceptance of the deed, and was allowed homestead out of the property recovered from her by the creditors. The preceding cases were fully reviewed by Judge McAllister, and the conclusion reached that the wife's right of homestead is not lost when the conveyance is not fraudulent in fact. It is a matter of no importance whether the application for a homestead came from the petitioner, or his wife, or both. The homestead is for the joint benefit of husband, wife, and minor children. The wife's application, as would that of the husband, inures to the use of all. In Himes v. Smith, 2 Tenn. Cas. 431, a homestead was allowed upon the husband's application against his own deed, his wife not having joined therein. A valid joint conveyance by husband and wife, or a joint participa-

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tion in a conveyance fraudulent in fact, is necessary to convey or forfeit the homestead right. In both Ruohs v. Hooke and Rosenbaum v. Davis, cited above, the husband was grantor and the wife grantee; yet the wife's application for homestead was not denied, though she was a party to the conveyance which had been set aside as constructively fraudulent. The estoppel in those cases was no stronger against the husband than the wife. What the one gave, without moral fraud, the other had accepted. The test is, was the conveyance in which husband and wife participated, either as joint grantors or as grantor and grantee, free from actual, wicked fraud? If so, the homestead right may be asserted in property thus conveyed as against the claims of creditors affected thereby. If, on the other hand, the transaction is tainted with purposed fraud, the right of homestead is lost when both husband and wife participate. This forfeiture of the homestead right in cases of actual fraud is said in Gibbs v. Patten, 2 Lea, 180–183, to be a rule founded on ethics, "in that it visits fraud with severe penalties."

This brings us to the question as to the actual character of the conveyance made by the petitioner and his wife of the property in which the petitioner now asserts a right of homestead. That this review of the order of the district judge extends only to questions of law must be conceded. If the facts have been settled by the district judge, we cannot go behind his finding of fact. There was a finding of fact and law by the referee, but the order of the referee was not reviewed upon this finding of facts nor upon the referee's summary of the evidence. The referee certified the entire evidence as an agreed statement of facts, and the district judge reviewed the referee's order upon the entire evidence heard by the referee. In this state of the record the finding of facts or opinion of the referee upon the facts is of no evidential value. The hearing by the district judge was an original hearing upon all of the evidence. But it has been argued that the learned district judge found that the deed to Taylor was fraudulent, and that this finding is conclusive. But the learned district judge did not find that the transaction was fraudulent in fact. Having well in mind the distinction between constructive and actual fraud, he stopped with a finding that the conveyance was "fraudulent in law." Referring to his opinion, which constitutes the only finding made by him, he said upon this subject that, "upon the evidence disclosed by the record, there can be no doubt that the conveyance made by the bankrupt of the land in which the homestead is now claimed was fraudulent; certainly so in law, whatever might be considered true as a matter of fact." In the absence of a specific finding of the fact of actual as distinguished from constructive fraud, we can only conclude that the order of the referee was confirmed upon the ground that the conveyance was constructively fraudulent, and that under the Tennessee decisions the bankrupt forfeited his right of homestead by a conveyance constructively fraudulent if the wife joined therein. That the learned judge did not mean to be understood as finding fraud in fact is very obvious from the agreed statement of facts, which constituted the whole of the evidence. The only evidence consisted in that given by

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the bankrupt himself when examined at a creditors' meeting. The sum of it is this: Acting under bad legal advice, he assumed that this entire tract of land, being only of the value of $1,000, was exempt, and could be conveyed at his pleasure, without wrong to his existing creditors. He wished to convey it to his wife, but, being advised that he could not do so directly, he conveyed to Taylor, who was closely related to his wife, with the purpose and in trust that Taylor would convey it to his wife. Two months afterwards he applied to be declared a bankrupt, and omitted this property from his schedule. Later on, and before he had been examined, or any step taken to reach this property, he was advised that the creditors had a right to the remainder interest in his homestead. Thereupon he procured Taylor to reconvey to him, applied for and obtained leave to amend his schedule by adding this property as an asset in which he claimed a homestead. That the conveyance of the remainder estate was voluntary and void as to creditors because he was at the time indebted to insolvency, is plain. But that his purpose was to cheat, defraud, or hinder his creditors is not the inference which the district judge drew from this evidence. So far as the conveyance was in contravention of the rights of his creditors, he has rectified matters by procuring a reconveyance. This he did in advance of any action by creditors or in their behalf. But, assuming that he has thereby accomplished what an action by the trustee would have accomplished, and that his rights are not other or greater than if the trustee had set the deed aside, we nevertheless reach the conclusion that the transaction was free from moral fraud, and was only constructively fraudulent. The case is, therefore, governed by the milder and more just rule announced in Ruohs v. Hooke and Rosenbaum v. Davis, cited above. The order denying homestead was erroneous. It will be set aside, and the property sold, subject to the homestead rights of the petitioner as herein indicated. The trustee will pay the costs of this proceeding out of the bankrupt's estate.

(106 Fed. 880.)

McCLAIN, Collector, v. FLESHMAN.

(Circuit Court of Appeals, Third Circuit. February 21, 1901.)

No. 21.

1. INTERNAL REVENUE—STAMP TAXES—AGREEMENTS TO SELL STOCKS.

A stockbroker by his course of business entered into agreements with his customers to buy or sell stocks at a fixed price for future delivery. Each of such agreements was evidenced by a written memorandum properly stamped in accordance with Schedule A of the war revenue act of 1898, which enumerates, as subject to stamp taxes imposed by the act, "all sales or agreements to sell or memoranda of sales or deliveries or transfers" of stock. The transactions were purely speculative, conducted on margins, and no actual delivery of stocks was contemplated by the parties, but settlement was made by the payment of differences and the surrender of the written memoranda. *Held*, that such settlements did not involve agreements for a resale of the stocks, requiring new memoranda to be made and stamped under such provision; the courts

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having no authority to infer such agreements, contrary to the fact, for the purpose of extending the provisions of the statute to transactions not within its terms.

2. SAME—MODE OF COLLECTION.

Where a person fails to make and deliver bills or memoranda of agreements made by him to sell stocks and affix stamps thereto as required by section 25 of the war revenue act of 1898, a collector has no authority to demand and collect from him the value of the stamps which would have been required had he complied with the law,—the only remedy provided for a violation being by prosecution and fine or imprisonment; and a payment so enforced by a collector under threat of suit is illegally exacted, and may be recovered back.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 105 Fed. 610.

Wm. M. Stewart, Jr., for plaintiff in error.

F. B. Bracken, for defendant in error.

Before DALLAS and GRAY, Circuit Judges, and BRADFORD, District Judge.

GRAY, Circuit Judge. This is an appeal from the judgment of the circuit court of the United States for the Eastern district of Pennsylvania entered in favor of J. B. Fleshman & Co. upon a demurrer to a statement of claim filed by him. The suit was brought to recover from the collector of internal revenue the sum of $4,544.90 exacted by said collector from the plaintiff. As disclosed by the statement of claim, the appellee, Fleshman, being a stockbroker, entered into various agreements with customers, whereby in some instances he agreed to sell, and in others to buy, shares of stock. Each agreement was evidenced by a written memorandum, to which, at the time it was issued, tax stamps were affixed, in accordance with the provisions of the war revenue act of 1898, imposing a stamp tax on sales or agreements to sell shares of stock. The stock embraced in these agreements was not at any time in the possession of either of the parties thereto. No delivery of stock was made in accordance with the terms of the agreements, and none was contemplated by the parties when they were entered into; the transactions being purely speculative, and the intention being to settle by the payment of differences. Settlement in each case was in fact made in this manner,—Fleshman paying to the other party to the agreement the difference between the agreed price and the market price at the time of settlement, the party receiving payment then surrendering to Fleshman the original memorandum issued in connection with the transaction; but no new paper or instrument of any kind was issued by either of the parties. The commissioner of internal revenue held that these settlements necessarily involved agreements to resell the stock, in connection with which new memoranda, bearing tax stamps, should have been issued, as provided by the act of June 13, 1898, Schedule A, and, this not having been done, Fleshman was liable to a tax equal to the value of the tax stamps which should have been attached to such memoranda if they had been issued.

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The original memoranda evidencing the agreements of purchase or sale had, as already stated, proper stamps attached thereto; and the first question raised by the demurrer was whether the subsequent settlements which in due course of such business were made between the appellee and his customers, by which "differences" were paid and received according to the authorized quotation of the New York stock market, should have been evidenced by memoranda to which stamps appropriate to contracts of sale or purchase of shares of stock should have been attached.

Section 6 of the internal revenue act, above referred to, provides as follows:

"Sec. 6. That on and after the first day of July, 1898, there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this act, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, shall be written or printed by any person or persons, or party who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued, the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in the said schedule."

Schedule A, therein referred to, is headed, "Stamp Taxes," and the provision with which we are concerned is as follows:

"On all sales, or agreements to sell, or memoranda of sales or deliveries or transfers of shares or certificates of stock in any association, company, or corporation, whether made upon or shown by the books of the association, company, or corporation or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock, or to secure the future payment of money, or for the future transfer of any stock, on each hundred dollars of face value or fraction thereof, two cents."

A brief analysis of the transactions in question will, we think, clearly determine the applicability thereto of these provisions of the law. The original contract was a contract in which the appellees agreed either to sell to or buy from their customers a certain number of shares of stock, and provided that these shares should be receivable or deliverable within a certain number of days. The purely speculative character of the transaction is attested by the fact that no delivery or transfer of shares was contemplated, and that in each case a payment on account was made by the customer, whether it be a transaction of sale or of purchase on his part. This payment is receipted for in the memorandum in every case, and is known in stockbrokers' parlance as a "margin." But for the purposes of this case we are treating the transactions evidenced by the memoranda as valid agreements of sale or purchase. As such, they have had affixed to them the stamps called for in Schedule A. When, however, these transactions came to be closed or "rounded up," no stocks were demanded or delivered on either side, or expected to be, but a payment was made or received by one side or the other according as the quotations of the New York stock market showed that within a given time the stocks had risen or fallen. This payment represented the difference between the prices mentioned in the memoranda of agree-

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ment at which the stocks were bought or sold, and that at which they were at the time given quoted in the said stock list. No sale or agreement to sell or memoranda of sale or delivery or transfer of shares or certificates of stock were necessary or required or appropriate in or to such a settlement. It was, as contended for by the appellees, either the closing of a purely wagering transaction, or the adjustment and payment of damages resulting to one of the parties by reason of the breach of contract on the part of the other in failing to deliver the stock when demanded, or receive it when tendered, as provided by the agreement. When this settlement, by the payment or receipt of an amount of money representing the difference alluded to, was made, the transaction was closed, and the memoranda of sale or purchase were surrendered. No new transaction of purchase or sale being required, there is no memorandum or other document representing such supposititious sale or purchase requisite, and no legal obligation to make such rested upon the parties, or either of them. The parties chose to stop short of the point where such a document, requiring to be so stamped, would be necessary. Their right to so stop cannot be gainsaid under any correct construction of the law in question. No paper or instrument properly evidencing the settlement of the stock transactions as described above and set forth in the statement of claim, even if drawn up, would be included in the designation or description of taxable instruments in Schedule A of the revenue act. We are of opinion, therefore, that the imposition of tax by reason of these transactions was, for the reasons stated, wholly unwarranted. That the dealings in question are gambling transactions cannot affect our view of the law. If congress desires to pursue them with exactions in the way of tax, it may rightfully do so; but, however desirable such penalty or taxation may appear to be, it should not be inflicted or imposed by a strained judicial construction.

The court below based its opinion overruling the demurrer upon another ground, equally controlling and decisive of the case in hand. The reasoning of the court on this point is so full and clear that we prefer to quote and adopt it as our own, rather than attempt to paraphrase it. It is as follows:

"Assuming the government's position to be correct,—that each of the plaintiff's transactions, to be complete, should have embraced a written contract to resell, duly executed, stamped, and delivered,—and assuming further that the war revenue act was violated because such contracts were not executed and stamped, the question still remains, did such violation authorize the collector to demand from the plaintiff a sum of money in cash? As it seems to me, this question must be answered in the negative. The taxes under consideration are stamp taxes upon certain agreements, and taxes of this kind are not sums of money assessed annually, or for any other period, against either the citizen or his property. The remedies ordinarily used for the collection of such sums are not available to enforce the use of stamps under the war revenue act, because these remedies are not given by the statute, and are not implied from the nature of the citizen's obligation. Stamp taxes upon agreements are charges by way of excise, and the government collects the charge by selling the necessary stamps and requiring them to be affixed to the material evidence of the contract. If this requirement is disobeyed, the statutory punishment is fine or imprisonment, coupled with the suspension of the evidential value of the written instrument; but nowhere in the act is there to be found any provision empowering a collector to distrain

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or sue for, or collect in any other manner, the money that ought to have been paid to the government for the stamps that were not used. Not being provided for by the statute, the course pursued by the defendant—demanding and collecting cash under threat of suit—was without authority, and the exaction was therefore unlawful. Congress possessed the sole power to authorize this tax, and the sole power to prescribe the means by which it should be collected. Meriwether v. Garrett, 102 U. S. 515, 26 L. Ed. 197. No remedy by suit is given or implied by the act in question, nor is there to be discovered any authority to demand and accept money in lieu of the stamps that are required by law to be affixed. The attorney general has recently shown clearly, in an opinion published in 3 Treas. Dec. 24, that the stamp taxes imposed by Schedule A contemplate an instrument or paper to which the stamp can be affixed, and has pointed out further that the act requires the making of certain instruments that are liable to be taxed, while it leaves to the option of the parties the making of other instruments that, if made, are also taxable. A penalty for failure to obey this statutory requirement is provided, but I find no other remedy in the act. Moreover, even if written agreements to resell ought to have been made by the plaintiff or his customers, the obligation rested upon the plaintiff only as to some of the agreements in question. In many instances he was not the seller, but the buyer, while Schedule A requires a bill or memorandum of sale to be made and delivered 'by the seller' to the buyer. Upon any theory of the obligation imposed by the act, therefore, the plaintiff seems to have a good claim for at least $3,029.94. But, for the reason already given, I think the whole claim is good. In the case of White v. Treat (C. C.; decided by Judge Lacombe in March of this year) 100 Fed. 290, it appears that Treat, the collector, required White, who had sold numerous 'calls' or written options to buy stock at a certain price, to purchase stamps and affix them to the respective calls. This method of procedure does not seem to have been objected to, and it may, perhaps, have been justified. If the calls ought to have been stamped, White was not likely to object to the collector's demand that the stamps be put in, since he was already liable to indictment, and might be obliged, under section 7 of the act, to pay a maximum fine of $100 for each offense; but, if he had refused to affix the stamps, I am unable to discover any other remedy than the proceeding by indictment. In like manner, Fleshman would have been liable to indictment if, and so far as, he, and not his customers, was bound to affix a second stamp to the agreements between his customers and himself upon the completion of the game in which they were engaged, and if he failed so to do. If, and so far as, he was bound to execute and deliver an agreement to resell, and failed to do so, Schedule A itself provides a penalty of fine or imprisonment for such omission. He could not have been sued at law to recover the face value of the stamps alleged to have been necessary, and the exaction of payment under a threat of suit was therefore unlawful."

We are of opinion, therefore, that on both the grounds stated the judgment of the court below should be affirmed, and it is so ordered.

(106 Fed. 884.)

BARTLETT v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit, February 11, 1901.)

No. 617.

PERJURY—FALSE SCHEDULE IN BANKRUPTCY—INDICTMENT.

An indictment charging the accused with having committed perjury by falsely omitting assets from his sworn schedule in bankruptcy, which alleges that he knew his schedule was false, and that he knew he was the owner of a specified sum of money in addition to what was mentioned in his schedule, is fatally defective, unless it also charges directly that he had other property than that described in his schedule.

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In Error to the District Court of the United States for the District of Montana.

The plaintiff in error was found guilty of perjury under an indictment which charged him with making a false oath to a schedule which he, as a voluntary bankrupt, filed in bankruptcy. The indictment charged him with deposing that he had $168.90 in money, and that his schedule contained a statement of all his estate, both real and personal. It further charged that he then and there well knew that the schedule did not contain a statement of all his estate, both real and personal, in accordance with the acts of congress relating to bankruptcy; that he then and there well knew it was not true that the said schedule aforesaid contained a statement of all his estate, both real and personal, in accordance with the acts of congress relating to bankruptcy, but that he "then and there well knew that, in addition to the said estate so set forth as aforesaid in the schedule aforesaid, he was then and there the owner of the sum of five thousand dollars in money, the said money being lawful money of the United States, a more particular description of which said money is to the grand jurors aforesaid unknown." The plaintiff in error demurred to the indictment for the reason that the facts stated were insufficient to constitute a public offense, in that the indictment failed to state that the accused was the owner of the sum of $5,000 which was alleged to have been omitted from his schedule. One of the assignments of error is that the court overruled the demurrer.

McHatton & Cotter, for plaintiff in error.

William B. Rodgers, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Is the indictment fatally defective for the reason that it fails to allege directly that the accused, at the time of making his affidavit, had in fact other property than that which he deposed that he had? There can be no doubt that at common law it is absolutely necessary to an indictment for perjury to include direct and specific allegations negativing the truth of the alleged false testimony, together with affirmative averments setting up the truth by way of antithesis. This requirement was not one of form merely, but was regarded as going to the essence of the indictment. It was considered necessary to make such "assignments of perjury" in order to inform the accused of the nature and cause of the accusation against him. Section 5396 of the Revised Statutes enacts the substance of the common-law rule in this regard by requiring that an indictment for perjury must set forth the substance of the offense charged, "together with the proper averment to falsify the matter wherein the perjury is assigned." Said the court in Markham v. U. S., 160 U. S. 319, 326, 16 Sup. Ct. 288, 40 L. Ed. 441: "An indictment for perjury that does not set forth the substance of the offense will not authorize judgment upon a verdict of guilty." The supreme court has repeatedly declared the rule to be universal "that every ingredient of which the offense is composed must be accurately and clearly expressed in the indictment or information, or the pleading will be held bad on demurrer." U. S. v. Mann, 95 U. S. 580, 24 L. Ed. 531; U. S. v. Carll, 105 U. S. 611, 26 L. Ed. 1135; U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588. An indictment which charges the accused with having committed perjury by falsely omitting from his schedule in bankruptcy certain of his

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property must not only allege that his deposition was false in that regard, but it must go further, and allege that he had other property, and describe the property so omitted; otherwise, it does not inform him of the offense with which he is charged, and does not contain proper averments to falsify the matter wherein the perjury is assigned. U. S. v. Pettus (C. C.) 84 Fed. 791; U. S. v. Morgan, Morris, 341.

The indictment in the present case does not directly charge that the accused had, at the time of making his affidavit, property other than that which was described in his schedule. It alleges that he knew that his affidavit was not true, and that he knew that he was the owner of the sum of $5,000 in addition to what was mentioned in his schedule. This is not an allegation that the accused owned $5,000 above what was mentioned in his schedule. It is contended that it is equivalent to such an allegation, because it may be reasoned that he had the money from the allegation that he knew he had it; or, in other words, that he could not have known he had it unless he had it. The facts material to be charged in an indictment must be stated clearly and explicitly, and must not be left to intendment, or reached by way of inference or argument. The indictment in this instance states no ultimate fact in regard to the ownership of the $5,000, or even as to its existence. It states only a condition of the mind of the accused, knowledge that he is said to have possessed. This is not sufficient. Harrison v. State (Tex. Cr. App.) 53 S. W. 863; Com. v. Still, 83 Ky. 275; Com. v. Porter (Ky.) 32 S. W. 138; Com. v. Weingartner (Ky.) 27 S. W. 815. In the case last cited the indictment charged the defendant with falsely deposing that one to whom he had let a house had, without his knowledge or consent, sublet the same; and that he well knew that he had authorized and consented to the subletting of said house. It was held that this was not tantamount to charging that the accused swore that his tenant had sublet the house without his knowledge or consent. The court said: "In the case under consideration we may reach the conclusion by a process of reasoning, and only by such process, that to aver that the witness 'well knew' he had authorized and consented to the subletting is equivalent to the averment that he had authorized and consented to it; but it is not in fact a specific averment of the falsity of the matter on which the false swearing is assigned, and this is held to be necessary in all the cases." In Com. v. Porter it was charged that the defendant swore falsely that he did not see a certain person at a certain place, that he knew the testimony to be false, that the said person was at said time and place "in the presence and sight" of the defendant. It was held that this was insufficient, and that the indictment must aver that the defendant then and there actually saw the person. "Barker could have been in the presence of the accused," said the court, "and still not have been seen by him. He could have been in his sight,—that is to say, at a point where accused could have seen him had his eyes been cast in that direction,—and still not have been seen by him." We think the demurrer to the indictment should have been sustained. The judgment is reversed, and the cause remanded, with instructions to quash the indictment and discharge the plaintiff in error.

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(106 Fed. 892.)

MULLEN et al. v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. February 12, 1901.)

No. 885.

1. CRIMINAL LAW—PRESUMPTION OF GOOD CHARACTER—RIGHT TO INSTRUCTION.
In a criminal trial in a federal court, where no testimony has been offered as to the previous character of the accused, a presumption of good character exists in his favor, of which, upon a request therefor, the jury should be instructed.

2. SAME—INSTRUCTIONS—COMMENT ON DEFENDANT'S CHARACTER.
It is prejudicial error for the court, in charging the jury in a criminal case, to comment unfavorably upon the general character of the accused, or to intimate his opinion that the accused is not of good character, where there was no evidence in the case upon the subject. It is only permissible for a judge in a federal court to express an opinion on the facts when it is based upon evidence in the case; and such comment is, moreover, inconsistent with the presumption of good character which the law raises in favor of the accused, and deprives him of the benefit of such presumption with the jury.

In Error to the District Court of the United States for the District of Kentucky.

The plaintiffs in error were indicted for alleged violations of the Revised Statutes of the United States (section 5508), in that, being respectively judge of the election, sheriff of election, clerk of election, and challenger, at an election held on November 7, 1900, at Louisville, Ky., for the election of persons to fill certain state and municipal offices, they had entered into a conspiracy to injure, oppress, threaten, and intimidate certain colored persons, on account of their race, color, and previous condition of servitude, in the free exercise and enjoyment of the right and privilege which such persons then and there had, and which was then and there secured to them by the constitution and laws of the United States, of voting for persons to fill said offices. In the progress of the trial no evidence was offered, either by the government or defendants, concerning the general character of the accused prior to the commission of the alleged offense. In the course of the charge the learned judge said: "Now, it is a fact that cannot escape your attention—could not probably escape your attention—that, if these defendants desired, or anybody behind them desired, to have colored men deprived of the right of voting, that it would be at such a precinct as this; and it is not improbable that just such men as these defendants would be chosen to carry that object into execution. Those are circumstances that you might weigh in this case in reaching a conclusion." At the conclusion of the charge, in the presence of the jury, counsel for the prisoners excepted to this comment, to which the court responded: "What I said on that subject may stand, because it is well qualified. The jury understand it was only the comment of the court, which they were not bound by." Further, counsel for plaintiffs in error, at the conclusion of the charge, said: "If your honor please, we offered your honor an instruction that the defendants were presumed to be persons of good character, and that that presumption prevailed during the progress of the case." To which the court responded: "I do not think that the jury should be told that the defendants are presumed to be persons of good character, but they are presumed, as the court had told the jury, whether of good character or bad character, to be innocent until their guilt has been established to the exclusion of a reasonable doubt by testimony." An exception was taken to the court's ruling in declining to instruct the jury as to the good character of the accused, and, before the jury retired, the defendants, and each of them, moved the court to instruct and charge the jury as follows: "You are charged that the law presumes the good character of the accused, and such presumption is to be considered as evidence in favor of the accused in considering the question of

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the guilt or innocence of them, or any of them." But the court refused to so instruct the jury, to which ruling of the court each of the said defendants then excepted.

Lawrence Maxwell, Jr., Swager Sherley, and Thos. R. Gordon, for plaintiffs in error.

R. D. Hill and W. C. P. Breckenridge, for the United States.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

DAY, Circuit Judge, after stating the foregoing facts, delivered the opinion of the court.

The comment of the judge in his charge and the several refusals to charge in the exceptions noted raise the question whether in a criminal trial, in a court of the United States, where no testimony has been offered as to the previous good character of the accused, a presumption of such good character exists in favor of the accused, of which, upon a request to that effect, the jury should be instructed. The supreme court of the United States, dealing with the presumption of innocence in criminal trials, in the case of Coffin v. U. S., 156 U. S. 432, 460, 15 Sup. Ct. 394, 405, 39 L. Ed. 481, 493 (opinion by Mr. Justice White), said:

"The fact that the presumption of innocence is recognized as a presumption of law, and is characterized by the civilians as a presumptio juris, demonstrates that it is evidence in favor of the accused: for in all systems of law legal presumptions are treated as evidence giving rise to resulting proof to the full extent of their legal efficacy."

This reasoning applies to the presumption, if such exists, of good character of the accused, and should be given in the charge to the jury where a specific request on that subject is made at the trial. Does such presumption exist? We fail to find any difference of opinion in the well-recognized text writers upon this subject. All assert that a presumption exists in favor of the accused in the absence of testimony that he had a good character previous to the time of the alleged commission of the offense in question. It is true that the government may not attack the character of the accused until he puts it in issue by affirmative testimony on his part. He is not obliged to do this, but may, if he sees fit, rest upon the presumption raised by the law. Bishop states the doctrine thus:

"The doctrine is that the defendant is presumed to be innocent, and his character to be at least of ordinary goodness." 1 Bish. New Cr. Proc. (4th Ed.) § 1112, par. 2.

This philosophical writer couples the presumption of innocence with that of character. Underhill, in his late work on Criminal Evidence, states the law in the following terms:

"The character of the accused means his reputation; i. e. the general consensus of opinion regarding him, based on his deportment and conduct, which is held by his neighbors, friends, and acquaintances. The accused may always prove his good character. If, however, he offers no evidence on this point, the law presumes he has a fair and respectable, if not, indeed, an excellent, character; and does not permit any presumption of guilt to arise from his silence, or from his failure to offer evidence on this point. That his character is bad can never be presumed, nor should the prosecution be permitted to comment unfavorably upon this omission." Section 76.

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We had occasion to examine this question under somewhat different circumstances than those which arise in this case in the case of McKnight v. U. S., 38 C. C. A. 115, 97 Fed. 210, where the trial court permitted the prosecutor to comment upon the failure of the accused to produce evidence of his good character, and argued that the jury could thereby draw the conclusion that such failure of proof showed a want of such character. We held such comment, when approved by the court, to be reversible error. It is true that there are cases which hold that, where there is no testimony upon the subject, the court is not obliged to say anything to the jury, either one way or the other. But, if the presumption exists in favor of the accused, it cannot be available to him unless he can have an instruction advising the jury of this proposition of law. This presumption, to the extent to which it exists, though less important, is as much his right in a criminal trial as the presumption in favor of his innocence. It is in consonance with the general principle of law that a man is presumed to stand ordinarily well, and to have at least the average qualities of morality and good conduct. Taking the charge of the court, together with the comments as to good character, above set forth, the jury were practically instructed that no presumption existed in favor of the good character of the accused; for the learned judge said that he did not think the jury were to be told that the defendants were presumed to be persons of good character, but, whether of good character or bad character, they were presumed to be innocent. This language affords the inference that this presumption exists only in favor of innocence, and not of character. The court, without testimony on that subject, conveyed to the jury its impression that the character of the accused was such that it raised an inference of the likelihood of their participation in just such violations of law as were charged in the indictment. It is true that the learned judge said, in response to an exception upon this subject, that it might stand because well qualified, and that the jury would understand that they were not bound by it. Nevertheless, it was the comment of the court, without supporting testimony upon which to base it, and inconsistent with the presumption which the law raised in favor of the accused. Doubtless, the judge, in a criminal trial, in the United States courts, may express his opinion upon the evidence in the case; and, where no rule of law is incorrectly stated, and the jury left to draw their own conclusions, his expression of opinion will constitute no ground for reversal. See cases collected note 12, Vany v. Peirce, 26 C. C. A. 521 (s. c. 82 Fed. 162). While this is the general rule, the supreme court of the United States, in a number of cases, has had occasion to call attention to the limitations of this doctrine. Hickory v. U. S., 160 U. S. 408, 16 Sup. Ct. 327, 40 L. Ed. 474. The subject was fully discussed in the opinion of the chief justice in Starr v. U. S., 153 U. S. 616, 14 Sup. Ct. 919, 38 L. Ed. 841. In that case the chief justice quotes with approval the language of the supreme court of Pennsylvania in Burke v. Maxwell's Adm'rs, 81 Pa. St. 153, as follows:

"When there is sufficient evidence upon a given point to go to the jury, it is the duty of the judge to submit it calmly and impartially. And, if the

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expression of an opinion upon such evidence becomes a matter of duty under the circumstances of the particular case, great care should be exercised that such expression should be so given as not to mislead, and especially that it should not be one-sided. The evidence, if stated at all, should be stated accurately, as well that which makes in favor of a party as that which makes against him. Deductions and theories not warranted by the evidence should be studiously avoided. They can hardly fail to mislead the jury and work injustice."

The chief justice adds:

"It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling. Hicks v. U. S., 150 U. S. 442, 452, 14 Sup. Ct. 144, 37 L. Ed. 1137. The circumstances of this case apparently aroused the indignation of the learned judge in an uncommon degree, and that indignation was expressed in terms which were not consistent with due regard to the right and duty of the jury to exercise an independent judgment in the premises, or with the circumspection and caution which should characterize judicial utterances."

Had there been testimony in this case warranting the comment, it would not have been error for the judge to have assisted the jury by such views as he entertained, leaving them free to decide disputed matters of fact for themselves. But the case was devoid, as we have seen, of testimony as to the character of the accused. Doubtless, the oppressive conduct of the accused, if the witnesses for the government are to be believed, in preventing the exercise of the right of suffrage on the part of those clearly entitled to that privilege, which was reprehensible in the extreme, had something to do with the comments of the learned judge, and prompted the suggestion that such men as the accused would be persons from whom such conduct might be expected. There was no testimony in the case to warrant these comments, and, in their nature, they must be regarded as prejudicial to the accused in a high degree. We do not understand the practice in the federal courts, liberal as it is, to permit such comments outside of the testimony to go to the jury with the great weight which attaches to intimations of opinion from the judge. We think this comment, when coupled with the refusal to charge, as requested, upon the subject of character, practically destroyed the benefit of the presumption to which the accused were entitled. In this view of the case, we are constrained to reverse the judgment, and grant a new trial, without passing upon the other questions made in the case.

(106 Fed. 896.)

REILLEY et al. v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. February 12, 1901.)

No. 849.

1. LOTTERIES—CONSTRUCTION OF FEDERAL STATUTE.

Act March 2, 1895, providing that "any person who shall cause to be brought within the United States from abroad, for the purpose of disposing of the same, or deposited in or carried by the mails of the United States, or carried from one state to another in the United States, any

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paper, certificate, or instrument purporting to be or represent a ticket, chance, share, or interest in or dependent upon the event of a lottery," etc., defines three separate and distinct offenses; and to constitute an offense under either the second or third clause it is not necessary that the paper, certificate, or instrument should have been brought into the United States from abroad for the purpose of disposing of the same, those being the elements of the first offense alone.

2. INTERSTATE COMMERCE—WHAT CONSTITUTES—LOTTERY TICKETS.
The provision of Act March 2, 1895, that "any person who shall cause to be * * * carried from one state to another in the United States any paper, certificate, or instrument purporting to be or represent a ticket, chance, share, or interest in or dependent upon the event of a lottery * * * or similar enterprise," shall be guilty of an offense, is within the constitutional power of congress to regulate commerce among the states, and covers a case where an individual carries from one state into another a ticket or a slip of paper which is understood by all the parties to the transaction to represent the interest of the purchaser of a chance in a lottery or "policy" game in which the drawing has not taken place.

3. CONSPIRACY—CRIMINAL PROSECUTION—SUFFICIENCY OF EVIDENCE.
To sustain an indictment charging a conspiracy to commit an offense against the United States, under Rev. St. § 5440, it is not necessary that there should be direct evidence of a formal agreement; but it is sufficient if the evidence of the separate details of the transaction as it was carried out indicates with the requisite certainty the existence of a preconcerted plan and purpose.

4. CRIMINAL LAW—REVIEW ON APPEAL—OBJECTIONS TO EVIDENCE.
It is the established rule in the courts of the United States that, to entitle a party to a review of rulings admitting evidence, counsel, in making their objections, must state the grounds thereof.

In Error to the District Court of the United States for the Southern District of Ohio.

Thomas Shay, for plaintiffs in error.
Sherman T. McPherson, for the United States.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

SEVERENS, Circuit Judge. The above-named plaintiffs in error were convicted in the court below of the offense of having conspired to commit an offense against the United States. The statute which creates the offense of conspiracy and makes it punishable is section 5440 of the Revised Statutes, as amended by the act of May 17, 1879, which is as follows:

"If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment of not more than two years, or to both fine and imprisonment, in the discretion of the court."

The offense which the plaintiffs in error are charged with having conspired to commit is defined by the first section of the act passed March 2, 1895, entitled "An act for the suppression of lottery traffic through national and interstate commerce and postal service subject to the jurisdiction and laws of the United States." This section reads as follows:

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"That any person who shall cause to be
brought within the United States from abroad, for the purpose of disposing of the same,
or deposited in or carried by the mails of the United States,
or carried from one state to another in the United States, any paper, certificate, or instrument purporting to be or represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance, or shall cause any advertisement of such lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance, to be brought into the United States, or deposited in or carried from one state to another in the same shall be punishable in the first offense by imprisonment for not more than two years or by a fine of not more than one thousand dollars, or both, and in the second and after offenses by such imprisonment only."

We have divided the clauses of this section in such manner as to indicate what we conceive to be the true construction thereof, as will be hereafter explained. The indictment charges the respondents with having conspired within the district—

"To cause to be carried from one state to another in the United States, to wit, from the city of Newport, in the state of Kentucky, to the city of Cincinnati, in the state of Ohio, papers, certificates, and instruments purporting to be and to represent, as they then and there well knew, tickets, chances, shares, and interests in and dependent upon the event of a lottery and similar enterprise offering prizes dependent upon lot and chance; that is to say, to cause to be carried as aforesaid papers, certificates, and instruments purporting to be and to represent the chances, shares, and interests in the prizes which, by lot and chance, might be awarded to persons (to these grand jurors unknown) who might select certain numbers which by lot and chance should be included in twelve numbers drawn and selected as hereinafter stated, at certain drawings in lottery, which was an enterprise offering prizes dependent upon lot and chance, and commonly known as 'policy,' and consisted, as they then and there well knew, in the drawing and selection by lot and chance, at stated intervals, of twelve of the numbers from one to seventy-eight, inclusive, and of awarding prizes in various amounts (to these grand jurors unknown) to those who prior to the time of any one of said drawings and selections, upon the payment of a small sum of money, may have selected various combinations of numbers included in the said twelve numbers thereafter drawn and selected by lot and chance as aforesaid."

And it is further charged that:

"In pursuance of the conspiracy, and to effect the object thereof, being for the purpose of causing to be carried from one state into another in the United States, to wit, from the state of Kentucky to the state of Ohio, as aforesaid, papers, certificates, and instruments purporting to be and to represent tickets, chances, shares, and interests in and dependent upon the event of a lottery and similar enterprise offering prizes dependent upon lot and chance, as aforesaid, as they then and there well knew, said Anthony Hoff, John Edgar (alias Peter Edgar), Charles W. Reilley, and John Francis did then and there, on said date aforesaid, in the county, state, circuit, division, and district aforesaid, unlawfully, knowingly, and feloniously cause to be carried from one state to another in the United States, to wit, from Newport, in the state of Kentucky, to Cincinnati, in the state of Ohio, five certain papers, certificates, and instruments purporting to be and to represent chances, shares, and interests in the prizes to be awarded by lot and chance in the drawings to be made thereafter in said certain lottery, commonly known as the game of 'policy,' which said papers, certificates, and instruments were in the words and figures, following, to wit: [Here follow certain blocks of figures and letters.]"

And thereupon the indictment proceeds:

"Said papers, certificates, and instruments, and the letters and figures thereon, purported and represented to be and were tickets, chances, shares,

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and interests in and dependent upon the event of a lottery and similar enterprise offering prizes dependent upon lot and chance, and were and did represent various combinations of numbers selected by one H. T. Harrison, and other players and persons to the grand jurors unknown, as and being their interest and chance in a proposed drawing of said lottery, in accordance with the general scheme and plan hereinbefore described,—contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

Upon the trial the government offered evidence tending to prove that the respondents adopted a scheme of lottery business, called by them "policy," which they subsequently carried into operation, of the character following: The principal office for the transaction of the business was located in a building in Cincinnati, Ohio. The place where the drawings of numbers from a wheel were made was located in another building or room adjoining the principal office and connected with it by a private way. In various places in that city and elsewhere, in Ohio and other states, one, at least, being in Newport, Ky., they had offices or stations at which the patrons purchased tickets or chances in the drawings to be thereafter made in Cincinnati, at the place mentioned. Successive numbers from 1 to 78, inclusive, were each day put into the wheel, and at each drawing 12 numbers were taken out. A list of these 12 numbers was taken into the principal office and there recorded. Several hours in the day before these drawings respectively took place, the patrons purchased chances at the suboffices or stations from an agent of the respondents, or from one of the latter, in charge at that place. In this instance the purchase was made of the respondent Hoff at the Newport office. The purchaser (Harrison, in this instance) chose 3 of the numbers from 1 to 78, inclusive, and wrote them upon a slip of paper, of which, according to the method of doing business, he kept a duplicate. He handed his list of numbers, with figures to denote the sum paid, upon a slip of paper, and the money to pay for his chance, to the person in charge, to be transmitted to the principal office in Cincinnati, by the "carrier," who would call to take them up. When these slips and the moneys were all brought into the principal office, the drawing above mentioned took place. If the 3 numbers on the slip were of the 12 drawn from the wheel, the purchaser would win the prize, $200, when the game (of which there were several forms) was played on the basis above stated. If not, he lost. A report of the drawings was sent back to the station from which the slip came, and, if any purchaser had made a "hit," his slip would be returned with the prize to be there delivered to him. Of the respondents, Reilley was in charge of the principal office, Francis of the drawings, Hoff of the station in Newport, as already stated, and Edgar was the carrier. The slip of paper taken by the carrier represented the interest of the purchaser of the chance, and, although containing figures only, it had a definite meaning, and was understood by all the parties concerned. It was the transportation of some of such lists, one being that of Harrison, from Newport, Ky., to Cincinnati, Ohio, with knowledge of their character, that constituted the overt act done in pursuance of the conspiracy.

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The first question to be resolved arises upon the contention, made by counsel for plaintiffs in error, that upon the due construction of the first section of the act of March 2, 1895, the successive clauses enumerating the several cases in which the offense may be committed all depend upon a condition which is supposed to exist in consequence of the words first occurring, that the paper, certificate, etc., has been brought into the United States from abroad for the purpose of disposing of the same. It is argued that this must be so for the reason, and this is the principal ground of the argument, that by the second section of the act there is an express provision that no former statute against the establishment of lotteries, traffic in lottery tickets, and the circulation thereof or of advertisements relating thereto, should be deemed to be repealed by implication. Without going through with a reference to and an analysis of all such former statutes, it is sufficient to say that none such has been brought to our attention which is inconsistent with the statute in question, unless it be the act of September, 1890, which relates to the carriage of matter concerning lotteries in the mails, and which imposes a different penalty in such cases from that imposed by the act in question. From the fact of such discrepancy, it is contended that congress must have intended that the language of the later act should be construed to refer only to things brought in from abroad to be disposed of in this country, against which there had been no previous legislation imposing any other penalty than a forfeiture. There is some force in this argument, but we do not think it sufficient to overcome the clear indications to the contrary. In the first place, it would render the composition of the first section of the act of 1895 ungrammatical. In the next place, the title to the act indicates an intention to exert the power of congress in all directions authorized by the clauses of the constitution relating to the regulation of commerce and the establishment of a mail service. Besides, the distribution of subjects, by the language used in the latter part of the section, reflects upon the former part a similar meaning, and the whole section is in apt language to cover the ground indicated by the title of the act, and we see no necessity for extending the condition that the matter is brought in "for the purpose of disposing of the same" to other cases than that of bringing it into the United States from abroad. We have no doubt that the purpose of congress was to lay its hand upon the business at each and every one of the enumerated steps taken for the purpose of carrying it on, and that one of the steps it had in contemplation was the carrying of the instruments employed in the business from one state to another, and that as to this offense no qualification that the act should be done with the purpose of disposing of the thing carried was intended. We may at this point observe that, inasmuch as the section of the act under consideration constitutes three distinct offenses, we do not conceive it to be necessary to determine to what extent the act is inconsistent, in respect to the forbidden use of the mails, with former statutes, or, if there be such inconsistency, what the effect thereof may be; for the case before us does not involve that offense.

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But the question upon which we have the gravest concern, and which is of much importance, arises upon the objection that the act of March 2, 1895, in so far as it relates to the mere carrying of the obnoxious matter from one state into another, though done with knowledge of its character, transcends the constitutional power of congress. The statute was enacted in the exercise of the power to regulate commerce with other countries and between the states, and the power to establish post offices and post roads. That part of the statute on which the present indictment is founded depends upon the authority which may be exercised under the grant to congress of the first of these powers, and the question is whether the business in which these parties were engaged is "commerce" within the meaning of that term in the constitution. The question opens a field upon which some lines have been clearly marked, but with respect to the particular inquiry with which we have to deal we have no distinct guide. Commerce is said by Chief Justice Marshall in the leading case of Gibbons v. Ogden, 9 Wheat. 1, 6 L. Ed. 23, to undoubtedly mean "traffic," but to mean more than that, and to signify "intercourse." But both of these latter are general words, and do not precisely define what kind of intercommunication is meant; and we have to follow the course of subsequent adjudication in further elucidation of the scope and meaning of the word. Without going into other lines of inquiry than those which are most nearly relevant to the present subject, we come to the case of Paul v. Virginia, 8 Wall. 168, 19 L. Ed. 357, where the question was whether an agent of a New York insurance company, who was engaged in effecting insurance for his company in Virginia with residents of the latter state, was subject to certain regulations of that state of the conditions and manner under and in which such business should be done; and it was held—First, that it was competent for the state to prescribe the conditions upon which the foreign corporation should be admitted to do business in the state; and, second, that the business of insurance, conducted as that was, was not interstate commerce. It is to be observed, however, that, as pointed out by Mr. Justice Field, the business there in question did not involve intercourse between one party in one state and another party in another state; for the transactions took place wholly in Virginia, and the communications between New York and Virginia were wholly between the constituents of one party,—that is to say, the insurance company and its agent,—and the dealing was not between those persons. Said Mr. Justice Field:

> "The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the states, any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York while in Virginia would constitute a portion of such commerce."

That case would seem to have sometimes received a wider interpretation than the decision upon the facts would justify, and to have been supposed to justify the proposition that a contract of insurance effected through interstate communication is not interstate com-

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merce; but no authoritative decision affirming that proposition has been cited or has been found by us.

In the Trade-Mark Cases, 100 U. S. 82, 25 L. Ed. 550, Mr. Justice Miller, in the course of reasoning from analogies, at page 95, 100 U. S., and page 552, 25 L. Ed., said that:

"In Paul v. Virginia, 8 Wall. 168, 19 L. Ed. 357, this court held that a policy of insurance made by a corporation of one state on property situated in another was not an article of commerce, and did not come within the clause we are considering. 'They are not,' says the court, 'commodities to be shipped or forwarded from one state to another, and then put up for sale.' On the other hand," pursues the learned justice, "in Almy v. California, 24 How. 169, 16 L. Ed. 644, it was held that a stamp duty imposed by the legislature of California on bills of lading for gold and silver transported from any place in that state to another out of the state was forbidden by the constitution of the United States, because, such instruments being a necessity to the transaction of commerce, the duty was a tax upon exports."

With great deference to the learned justice, we cannot think that his statement of what was held in Paul v. Virginia was correct; and, moreover, the ground on which he says that that decision was placed, namely, that policies of insurance are not commodities to be shipped from one state into another and there put up for sale, could not be supported as sufficient, in view of what has been decided in other cases presently to be referred to, and would, as it seems to us, be much narrower than the bounds of the definition given in Gibbons v. Ogden.

The case of Paul v. Virginia was again cited in Philadelphia Fire Ass'n v. New York, 119 U. S. 110, 7 Sup. Ct. 108, 30 L. Ed. 342, but only, in that case, in support of the proposition that a state has power to prescribe the conditions on which a foreign corporation may be admitted to do business in the state. The question there was whether a foreign corporation which had entered the state and carried on business therein could question the validity of a law of the state prescribing such conditions. Paul v. Virginia was again referred to in Hooper v. California, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297 (at page 653, 155 U. S., page 209, 15 Sup. Ct., and page 300, 39 L. Ed.), which was a case involving the validity of a statute of California making it a misdemeanor for a person in that state to procure insurance for a resident thereof from a foreign corporation which had not filed the bond required by another statute of that state. The court held that the law was a valid exercise of the right of the state to prescribe conditions upon which the foreign corporation should be allowed to do business therein, unless such business of the foreign company was one of a "federal nature," one class of which is interstate commerce. To the contention that marine insurance (which was the business that the respondent was charged with having conducted without filing the bond required) was interstate commerce, and so beyond the reach of state authority, it was replied that:

"This proposition involves an erroneous conception of what constitutes interstate commerce. That the business of insurance does not generically appertain to such commerce has been settled since the case of Paul v. Virginia, 8 Wall. 168, 19 L. Ed. 357. See, also, Philadelphia Fire Ass'n v. New York, 119 U. S. 110, 7 Sup. Ct. 108, 30 L. Ed. 342, and authorities there cited."

It is not within our province to question the law as declared by the court in that case, nor have we any disposition to do so; but,

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for the purpose of comparing the classes of cases which we deem most relevant to our present duty, we are, no doubt, permitted to say that what we understand the language of the opinion last cited to mean is that the effecting of insurance is not necessarily interstate business, and would not be so where the contract was made in the state and the participants in the transaction were in the state. The case does not decide that if, by the method of doing the business, the party desiring insurance in one state should transmit his application therefor to an insurer in another state, and the insurer should thereupon transmit to the insured his acceptance of the application, this would not constitute interstate commerce. But, if this were so established, we do not think the doctrine would be applicable here, for reasons hereinafter stated. This class of cases is principally relied upon by counsel for plaintiffs in error as declaring the rule that in order to constitute commerce there must be traffic in commodities, and that interstate commerce involves also the transportation of such commodities from one state to another, and that mere business intercourse between parties residing in different states, unaccompanied by the transportation of commodities such as are bought and sold by traffic, is not within the scope of commerce between the states within the meaning of the constitution. But we do not think that, upon a comparison with other decisions of the supreme court, so broad a doctrine was intended to be affirmed in the cases to which we have referred.

Passing to other classes of cases arising upon the exercise of the power in question, it has been frequently held, as was said by Mr. Justice Bradley in Crutcher v. Kentucky, 141 U. S. 47, 11 Sup. Ct. 851, 35 L. Ed. 649, that the power of congress over interstate commerce is coextensive with its power over foreign commerce. Indeed, both are included in an identical grant. Can it be possible to hold that congress has not the power to prohibit the importation from abroad into the United States of instrumentalities for carrying on a business fraught with evil to its inhabitants? Or, to put a precisely relevant question, can it be doubted that congress has the authority to legislate against the importation of lottery tickets into the United States from foreign countries, as it has attempted to do by this act? It would seem that the denial of such power would be an unfortunate and uncalled-for restriction of the grant of authority intended by the constitution. Until recently congress had not seen fit to exercise its power in this direction, and for this reason the instance seems novel; but, in the circumstances, this is no argument against its existence.

In respect to the inquiry as to what constitutes interstate commerce, and particularly to the question whether it is limited to the case of traffic in and the transportation of commodities for the purposes of such traffic, reference may be profitably had to some other cases decided by the supreme court. We have already indicated our view that in Gibbons v. Ogden the subjects which were included in the power granted congress were not thought to be so restricted. In the case of Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 5 Sup. Ct. 826, 29 L. Ed. 158, it was held that the transportation of

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passengers, as well as freight, from one state to another by a ferry, was interstate commerce. In the case of Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 14 Sup. Ct. 1087, 38 L. Ed. 962, it was held that the company's bridge across the Ohio was an instrumentality of interstate commerce, because it furnished the means of intercourse between the people of two states, and the taking of toll for the passage of persons, as well as of freight, was interstate business. In that case it was remarked by Mr. Justice Brown, in delivering the opinion of the court, referring to the Gloucester Ferry Co. Case:

"If, as was intimated in that case, interstate commerce means simply commerce between the states, it must apply to all commerce which crosses the state line, regardless of the distance from which it comes or to which it is bound. In other words, if it be commerce to send goods from Cincinnati, in Ohio, to Lexington, in Kentucky, it is equally such to send goods or travel in person from Cincinnati to Covington."

And again:

"Commerce was defined in Gibbons v. Ogden, 9 Wheat. 1-189, 6 L. Ed. 23-189, to be 'intercourse,' and the thousands of people who daily pass and repass over the bridge may as truly be said to be engaged in commerce as if they were shipping cargoes of merchandise from New York to Liverpool."

In that case the "bridge" was a mere instrumentality. It was the use of it for the purpose of intercourse between the people of the two states which impressed upon the structure the character of an instrumentality or agency of such intercourse. Indeed, it is impossible to conceive that an instrument by which business is transacted can have any commercial character otherwise than as is reflected upon it by the business itself. Whether it be a ferry, a bridge, a railroad, or a telegraph line, the agency has no intrinsic quality which brings it within the purview of the commerce clause of the constitution. It acquires that quality from its appropriation to the uses of interstate commerce.

In Western Union Tel. Co. v. Texas, 105 U. S. 460, 26 L. Ed. 1067, it was decided that intercourse by the telegraph between the states is interstate commerce, and that a tax on messages is a tax on the commerce itself; and this doctrine has been reaffirmed in several subsequent cases. So it was held in the Passenger Cases, 7 How. 283, 12 L. Ed. 702, and Henderson v. Mayor, etc., 92 U. S. 259, 23 L. Ed. 543, that the importation of passengers into the United States was commerce with foreign nations, and so within the control of congress; and so it is not doubted that congress may legislate for the exclusion of passengers who, from diseased or other conditions, would be an offense to the welfare of the public. And in Crandall v. Nevada, 6 Wall. 35, 18 L. Ed. 744, the doctrine of the cases last cited was applied to the transportation of passengers by a railroad from one state into another. These cases seem to us altogether inconsistent with the idea that interstate commerce is limited to traffic in commodities or merchandise. In the telegraph cases, for instance, it is nowhere suggested that the messages which would be exempt from state taxation should be such only as relate to traffic. In the passenger cases there is no element of barter of commodities or merchandise of any sort.

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In the present case it would seem that the enterprise in which these parties are alleged to have been engaged was one which involved business intercourse between parties in different states, and that by means of the transportation of the instruments with which it was carried on from one state into another; and it is not material that transportation was done by a private individual, rather than by a corporation. The slip which represented the interest of the buyer of the chance, its contents being understood by all the parties to the transaction, was a ticket in the lottery. That the game was a lottery has several times been decided in the state courts. People v. Elliott, 74 Mich. 264, 41 N. W. 916, 3 L. R. A. 403; Com. v. Sullivan, 146 Mass. 142, 15 N. E. 491; Wilkinson v. Gill, 74 N. Y. 63; State v. Kansas Mercantile Ass'n, 45 Kan. 351, 25 Pac. 984, 11 L. R. A. 430.

The inclination of our judgment is to hold that the statute in question is not invalid, and that the present case is covered by it. But, conceding that there may be some doubt of the correctness of our conclusion that the statute is within the power of congress, the doubt we have is not sufficient to justify us in holding it to be invalid. Authority to legislate upon the subject of interstate commerce is conferred upon congress in terms which contain no restriction. That body must, from the necessity of the case, determine to what particular matters its power extends. Its determination is not final, but it should be made unmistakably clear that the assumption was erroneous before the courts can be justified in holding that the power did not exist.

It is further objected that the indictment is defective in not showing that a lottery was being conducted. No objection was made on this account either before or at the trial. We think it appears with reasonable certainty that such a transaction was being carried on, although the averments are not, perhaps, so direct and specific as would have been necessary to encounter a prompt objection on that account. The indictment is much more full and specific than that in Com. v. Sullivan, supra, which the court said was "well enough."

It is also urged that the evidence did not justify the verdict, in that there was no proof of conspiracy to do what was done. As has been often remarked, it is not necessary that direct evidence of a formal agreement should be given in such cases. If the evidence of the separate details of the transaction as it was carried out indicates with the requisite certainty the existence of a preconcerted plan and purpose, that is sufficient; and we think the evidence was such as to warrant the verdict.

Many objections were made upon the trial to the rulings of the court in admitting evidence. More than 150 errors are assigned, a large proportion of which relate to these rulings. Many of the objections related to similar matters, and there was needless and tiresome repetition. We have, however, gone through the bill of exceptions, and have found no instance in which any ground or reason whatever was assigned on which the objections were made. The reason for the rule requiring counsel to state the grounds of their objections is augmented where the frequency of objections may lead the

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court to the conclusion that the counsel is content to take his chances in finding the reasons afterwards. The rule itself is settled by a great number of decided cases, many of which are collected in 8 Enc. Pl. & Prac., at page 163; and see, especially, as indicating the practice in the courts of the United States, Camden v. Doremus, 3 How. 315, 11 L. Ed. 705, and Tabor v. Bank, 10 C. C. A. 429, 62 Fed. 383.

General exceptions were taken to the charge of the court to the jury. Some of them have been disposed of by what we have said in dealing with the topics already discussed. We have examined the instructions of the court, as well as the requests of counsel for the respondents to charge the jury, and think the case was fairly submitted to the jury, and that all proper instructions were given them. In view of the multitudinous exceptions and assignments of error under this head, we must content ourselves with refraining from a separate discussion of each. The judgment will be affirmed.

(106 Fed. 906.)

PACKER v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. January 8, 1901.)

No. 39.

1. POST OFFICE—USING MAILS TO DEFRAUD—PROSECUTIONS.

In a prosecution of a defendant under Rev. St. § 5480, on an indictment charging him with having devised a scheme to defraud, to be effected by the use of the post-office establishment of the United States, where the government introduced evidence, in support of the specific charges made, showing that defendant under an assumed name deposited in a post office circulars addressed to the persons named in the indictment, who were strangers to him, soliciting remittances to be used by him in stock speculations on account of such persons, which circulars contained on their face persuasive evidence of a scheme to defraud, and that defendant received through the post office remittances of money from such persons, which he subsequently reported to them as having been lost in such speculations, such evidence was sufficient to warrant the submission of the case to the jury.

2. SAME—FRAUDULENT INTENT—EVIDENCE OF OTHER TRANSACTIONS.

In such a prosecution, the question of fraudulent intent being the principal issue, other similar business transactions, conducted by defendant a year prior to those charged in the indictment, are not so remote in time that the court may not, in its discretion, permit them to be proved. Such evidence does not tend to prove that defendant had devised a scheme to defraud by the use of the mails, but that he was then engaged in a scheme similar in other particulars to that charged, the fraudulent character of which is in issue.

3. CRIMINAL LAW—EVIDENCE—LETTERS WRITTEN TO DEFENDANT.

A letter, written to a defendant charged with having devised a scheme to defraud, to be effected by the use of the mails, by a person claimed to have been defrauded by means of such scheme, after the transaction on which the charge was based had been closed, which contained a narrative of the past transaction and charges of fraud against defendant, but which was not answered or acted on by him, was not admissible in evidence against him, either as part of the res gestæ or as implying an admission on his part of the truth of the statements made therein; and its admission over his objection was prejudicial error.

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In Error to the Circuit Court of the United States for the Southern District of New York.

Frederick B. House, for plaintiff in error.
Ernest E. Baldwin, for the United States.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The plaintiff in error was convicted upon three counts of an indictment charging him with the offenses defined by section 5480, Rev. St. U. S. The indictment contained seven counts, and on the trial the government elected to proceed upon the first, second, and seventh. The counts charged him, in substance, with having devised a scheme to defraud, to be effected by the use of the post-office establishment of the United States, which consisted in inducing other persons to intrust him with money for investment in stock speculations, pursuant to which he deposited in the post office a certain circular signed by the fictitious name "James S. Robinson," depicting his success as an operator in such speculations, and promising the return of the moneys intrusted to him, together with large profits. The first count alleged that, pursuant to the scheme to defraud, he deposited one of these circulars in the post office at the city of New York January 28, 1899, addressed to one Moody at Portland, Me. The second count charged him with receiving, pursuant to the scheme to defraud, from the post office at New York City, on the 3d day of February, 1899, a letter containing a check from Moody for $300. The seventh count charged him with receiving, pursuant to the scheme to defraud, from the post office at New York City, on the 1st day of March, 1899, a letter from one Kriebel inclosing $50 in currency.

Upon the trial the government produced several witnesses, each of whom testified that he had received through the mail one of the circulars; that subsequently he made a remittance to Robinson, addressed to him at No. 32 Broadway, New York City; and that subsequently he received a letter from Robinson informing him that the investment had proved disastrous, and the amount remitted had been lost. The government also proved that registered letters addressed to James S. Robinson were receipted for by the plaintiff in error; that mail matter generally so addressed was delivered to him at the office No. 32 Broadway, New York City; and that the business at such office was conducted by him under the name of Robinson. The government also proved that one of the circulars signed by Robinson was addressed to Moody, and was mailed at New York City on or about January 28, 1899; that on or about February 3, 1899, Moody sent through the mail, addressed to Robinson at No. 32 Broadway, New York City, the letter and remittance described in the second count of the indictment; and that Kriebel received through the mail one of the circulars signed by Robinson, and thereafter, and shortly before the 1st day of March, 1899, sent through the mail, addressed to Robinson at No. 32 Broadway, New York City, a letter inclosing the remittance described in the seventh count of the indictment.

The correspondence which ensued between Robinson and the per-

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sons who sent remittances to him was introduced in evidence. In this correspondence Robinson acknowledged receipt of the remittances, referred vaguely to the speculations in which he was using them, in the earlier stages held out assurances of large profits, and finally explained how disaster had befallen the speculations. In the correspondence with Moody, Robinson's last letter was written March 18, 1899, and announced the total loss of the funds intrusted to him for use in speculation. After the introduction of this letter the government introduced a letter in reply from Moody to Robinson, written March 20, 1899. This letter rehearsed in part the substance of the previous correspondence, referred to a "Burlington deal," out of which Robinson should have made a large profit for Moody, and set forth generally a narrative and inferences tending to show that Robinson was a fraud, and had been deceiving Moody from the start. Witnesses were also examined by the government who gave testimony about dealings with the accused in December, 1897, and January and February, 1898, tending to show that he was then doing business under the name of the Hughes Investment Company, and called himself Hughes; that the business he was then conducting was similar in its nature and methods to that which he solicited in the circulars, and subsequently carried on.

Exceptions were taken upon the trial to the ruling of the trial judge refusing to direct a verdict of acquittal, as requested by the accused at the close of the evidence; to his ruling in receiving the testimony in regard to the transactions of the accused in December, 1897, and January and February, 1898, against the objections to its competency; and to the ruling admitting the Moody letter of March 20, 1899, against the objection to its competency. The assignments of error which have been argued at the bar are founded upon these exceptions.

To justify a conviction under the statute it was incumbent upon the government to prove that the accused had devised a scheme to defraud; that he intended to effect the scheme by opening correspondence with some other person or persons through the post-office establishment of the United States; and that in carrying out such scheme he either placed in or received from some post office of the United States a letter or packet. The statute permits the indictment to severally charge offenses to the number of three when committed within the same six calendar months. Each letter thus placed in or received from the post office pursuant to the scheme constitutes a separate and distinct offense. Ex parte Henry, 123 U. S. 372, 8 Sup. Ct. 142, 31 L. Ed. 174.

We entertain no doubt that the trial judge correctly refused to direct a verdict of acquittal. The circular carried upon its face such persuasive evidence of a scheme to defraud that it is somewhat remarkable that any person of ordinary intelligence should have been deluded by it to believe that it offered an honest proposition for an investment or speculation. It was extensively distributed by mail to residents of distant localities, who had never had any dealings with the accused, and to whom he was a stranger. We think that this circular, and the subsequent correspondence, were enough to

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authorize a finding by the jury that the scheme contemplated obtaining the money of unwary persons, ostensibly for use by the accused in stock speculations to be conducted at his discretion, and of keeping it and converting it to his own use by postponing a settlement with his employers, and finally representing that it had been lost in some untoward turn of the stock market. The proof was clear that he intended to effect this scheme by opening correspondence through the post office, and that in carrying it out the circulars and the letters were placed in and received from the post office, as specifically charged in the indictment. If the circulars, the correspondence, and the transactions of the accused, as exhibited by the testimony of the witnesses, were capable of an interpretation consistent with his innocence, the question was one for the jury, and not for the court.

The most serious criticism made upon the ruling admitting the evidence in regard to the previous business transactions of the accused is because of the remoteness of the time at which these transactions took place. Evidence of offenses not connected with the one for which the accused is on trial is generally inadmissible. Ordinarily, it does not tend to prove him guilty of the particular offense, and is exceedingly prejudicial in affecting his character with the jury. It is competent only when the quo animo is in issue. Because the intent is in issue whenever in criminal or in civil actions a fraudulent scheme or act is the subject of proof, evidence is competent of other frauds of like character committed by the party charged at or near the same time. In such cases the evidence is competent only when the other frauds or criminal acts are so connected as to time, and are so similar in other relations, that the same motive may reasonably be imputed to them all. Lincoln v. Claflin, 7 Wall. 138, 19 L. Ed. 106; Insurance Co. v. Armstrong, 117 U. S. 591, 6 Sup. Ct. 877, 29 L. Ed. 997; Mayer v. People, 80 N. Y. 364. It is obviously impossible to lay down a definite rule limiting the time within which such transactions must have taken place in order to make proof of them competent. Although it is generally said in the adjudications that they must have occurred about the same time as the commission of the particular fraud or offense in issue, such a statement is quite indefinite; and in some of the reported cases proof of them has been received although they occurred months before, and in others although they occurred afterwards. In the application of this rule each case must depend largely upon its own facts, and not infrequently the limit of time must rest practically in the discretion of the trial judge. We are not prepared to say that the transactions which were permitted to be proved in the present case were so remote in point of time as to be inadmissible, notwithstanding they took place about a year before those for which the accused was indicted. The evidence did not tend to show that the accused had devised a scheme to defraud to be effected by the use of the mails, but it did tend to show that he was then engaged in a scheme similar in other particulars to that charged in the indictment, the fraudulent character of which was in issue.

The introduction in evidence of the Moody letter was prejudicial to

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the accused, and we can discover no ground on which the ruling receiving it can be upheld. It was written and sent after the offenses charged in the indictment had been committed. The correspondence between Moody and the accused while the transactions evidencing the scheme to defraud were taking place was competent, because the letters were verbal acts constituting a part of the res gestæ. It was also competent because the letters from the accused were admissions of facts contained in them, and a response to the letters of Moody, and the latter were necessary to a correct understanding of the scope and effect of the admissions. It is urged that the last Moody letter was competent because it was a reply to a letter from the accused soliciting further remittances from Moody. The contention is fallacious unless it can be maintained as a correct legal proposition that a request admits in advance the statements made in response. This would be a very dangerous doctrine, and finds no color of support in the law of evidence. If only that part of the reply refusing to make further remittances had been read, no harm would have been done; but, as has been stated, the letter was, in substance, a narrative of past events, of which there was no other evidence, and an argument to demonstrate that the accused had been guilty of a scheme to defraud Moody. It is also urged that the letter was admissible as a tacit admission by the accused of the truth of its statements, it having been proved that the accused did not reply to it. Admissions, of course, may be inferred from silence as well as from express statements, but it has been uniformly held by the courts that the failure to reply to a letter is not to be treated in a criminal or in a civil action as an admission of the contents of the letter. In Com. v. Eastman, 1 Cush. 215, the court said:

"The letters, however, if properly identified, would not, of themselves, authorize any inference against the defendants. They were only the acts and declarations of others; and, unless adopted or sanctioned by the defendants by some reply or statement, or by some act done in pursuance to their suggestion, they ought not to prejudice the defendants. Letters addressed to an individual, and received by him, are not to have the same effect as verbal communications. Silence in the latter case may authorize the inference of an assent to the statement made, but not equally so in the case of a letter received, but never answered or acted upon. So far as these letters might be shown by other proof to have been acted upon or sanctioned by the defendants, so far they would be competent evidence."

In People v. Green, 1 Parker, Cr. R. 17, the court said:

"The maxim, 'Qui tacet consentire videtur,' has also been applied between the parties to certain mercantile dealings; as where an account current was sent to the party by letter, and no objection made to it within a given time, established by convenience or by commercial usage. But it could not, in principle, be applicable to facts stated in a letter which the party was not bound or interested to answer. It would be placing a man entirely at the mercy of another if he was bound by what others chose to assert in addressing letters to him. In no case could his silence be considered an admission of such facts."

It could not be applicable to any case where the letter only tends to support a charge of guilt, and where it has been followed by no action, and no response on the part of the person receiving the letter. The same principle has been repeatedly applied in civil actions.

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Fairlie v. Denton, 3 Car. & P. 103; Gaskill v. Skene, 14 Q. B. 664; Learned v. Tillotson, 97 N. Y. 1; Bank v. Delafield, 126 N. Y. 418, 27 N. E. 797; Gray v. Ice Cream Co., 162 N. Y. 397, 56 N. E. 903, 49 L. R. A. 580.

We conclude that the assignment of error based upon the reception of the Moody letter has been well taken, and for that reason the judgment must be reversed.

(106 Fed. 914.)

POTTER DRUG & CHEMICAL CORP. v. PASFIELD SOAP CO.

(Circuit Court of Appeals, Second Circuit. February 7, 1901.)

No. 82.

TRADE-MARKS—INJUNCTION.

Complainant was proprietor of the word "Cuticura" as a trade-mark for a toilet soap. Defendant placed on the market a soap which it called "Cuticle." There was nothing in the box, wrapper, or general get-up of the package which tended in any way to induce the purchaser of the latter soap to believe that he was purchasing the former. *Held* insufficient to authorize injunction at suit of complainant.[1]

Appeal from the Circuit Court of the United States for the Eastern District of New York.

This cause comes here upon appeal from a decree of the circuit court, Eastern district of New York, dismissing a bill in equity to restrain defendant from selling soap which, it is alleged, wrongfully simulated complainant's soap.

J. E. Maynadier, for appellant.

Noah Tebbetts, for appellee.

Before LACOMBE and SHIPMAN, Circuit Judges.

PER CURIAM. The complainant manufactures a soap which it calls "Cuticura Soap." The same has been advertised at considerable expense, and has become somewhat widely and favorably known. Defendant sells a soap which it calls "Cuticle Soap." The opinion of the circuit court sets forth in minute detail the manner in which the soaps of the respective parties are prepared for the market,—how they are put up, wrapped, lettered, etc. It is unnecessary to repeat this description. The opinion may be found in 102 Fed. 490. We have little doubt that in selecting a name which began with the first five letters of that applied to complainant's soap, and which referred, as that did, to the skin, the defendant had some expectation that he might succeed in effecting some sales, at least, on the strength of complainant's advertising; and if we were able to find anything in box, wrapper, lettering, or general get-up of the package which might tend in any way to produce confusion in the mind of the purchaser, we should not hestitate to grant the relief prayed for. But

[1] Unfair competition in trade, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper & Bros., 30 C. C. A. 376.

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this element of attempted deceptive resemblance, usually prominent, and, when prominent, controlling (Sterling Remedy Co. v. Eureka Chemical & Mfg. Co., 25 C. C. A. 314, 80 Fed. 105; Proctor & Gamble Co. v. Globe Refining Co., 34 C. C. A. 405, 92 Fed. 357), is wholly wanting, and its absence is not supplemented by any proof that the use of the first five letters of complainant's trade-word is in itself sufficient to mislead. Under these circumstances, we concur in the conclusion of the circuit court. Decree affirmed, with costs.

(106 Fed. 918.)

BRAMMER v. SCHROEDER.

(Circuit Court of Appeals, Eighth Circuit. February 25, 1901.)

No. 1,420.

1. PRIMARY AND SECONDARY PATENTS—APPLICATION OF DOCTRINE OF MECHANICAL EQUIVALENTS.

One who invents and secures a patent for a machine or combination which first performs a useful function is protected thereby against all machines or combinations which perform the same function by equivalent mechanical devices; but one who merely makes and secures a patent for a slight improvement on an old device or combination, which performs the same function before as after the improvement, is protected against those only who use the very device or improvement he describes and claims, or colorable evasions of it.

2. MECHANICAL EQUIVALENTS—INTERPRETATION.

The term "mechanical equivalent," when applied to the interpretation of a pioneer patent, has a broad and generous signification; but when it is applied to a slight and almost immaterial improvement in the progress of an art it has a very narrow and limited meaning, while in its application to all that great mass of inventions which falls between the two extremes its significance is proportioned to the character of the advance or invention under consideration, and is so interpreted by the courts as to protect the inventor against piracy and the public against unauthorized monopoly.

3. COMBINATION PATENTS—LAW OF MECHANICAL EQUIVALENTS HAS SAME APPLICATION AS TO OTHER PATENTS.

The doctrine of mechanical equivalents is governed by the same rules and has the same application in a case in which the infringement of a patent for a combination is in question as in cases where the issues are over the infringement of patents for machines or compositions of matter.

4. PATENT FOR COMBINATION—INFRINGEMENT NOT AVOIDED BY USE OF DIFFERENT MEANS OF OPERATION.

One who appropriates a new and useful patented combination cannot escape infringement by the use of mechanical devices to unite or operate the elements of the combination which differ from those which are pointed out for the purpose, but which are not claimed in the patent.

5. DRAWINGS PART OF SPECIFICATION OF PATENT.

Drawings are a part of the specification of a patent, and for the purpose of ascertaining the sufficiency of the description of the invention must be read with it.

6. CLAIM OF PATENT NOT INVALID FOR FAILURE TO INCLUDE OBVIOUS OPERATIVE DEVICES.

A claim for a machine or for a combination of mechanical devices is not invalid or insufficient because it fails to include mechanical devices

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for uniting or operating the machine or combination which readily suggest themselves to a mechanic skilled in the art, or which are pointed out in the specification and drawings as means for the purpose.

7. FIRST CLAIM OF LETTERS PATENT NO. 535,465 SUSTAINED.

The first claim of letters patent No. 535,465, to John Schroeder, for improvements in means for operating washing machines, is sustained.

8. PATENT NO. 535,465 INFRINGED BY COMBINATION SECURED BY PATENT NO. 606,044.

A combination of mechanical devices described in and claimed by letters patent No. 606,044, to Henry F. Brammer, infringes the first claim of letters patent No. 535,465.

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the Southern District of Iowa.

Paul Bakewell and W. J. Roberts (L. G. Susemihl and F. R. Cornwall, on the brief), for appellant.

Frank D. Thomason, for appellee.

Before CALDWELL and SANBORN, Circuit Judges, and ADAMS, District Judge.

SANBORN, Circuit Judge. This is an appeal from a decree adjudging the appellant, Henry F. Brammer, to be guilty of an infringement of the first claim of letters patent No. 535,465, for improvements in the means for operating washing machines, issued to the appellee, John Schroeder, on March 12, 1895, upon an application filed by him on October 23, 1894. The machine by which the alleged infringement was effected was constructed in accordance with the description contained in letters patent No. 606,044, issued to Henry F. Brammer on June 21, 1898. The subject of these inventions was the translation of the continuous rotary motion of a horizontal shaft in the same direction into the reciprocating rotary motion of a vertical shaft in opposite directions. The problem which the inventors were seeking to solve was to provide the simplest and most efficient means to accomplish this translation. Each used a combination of mechanical devices to solve this question, and the serious issue in this case is whether or not the combination of the appellant was an infringement upon that claimed and secured by the grant to the appellee. Of course, Schroeder was not the first to conceive the idea, or to provide some means of translating continuous rotary into reciprocating rotary motion. The problem is as old as mechanics, and doubtless its solution is nearly as old as the question. Many devices had been conceived and many means had been provided to accomplish the desired end before either of these parties entered the field, so that neither can be said to be a pioneer in this department in mechanics in the broad and general sense of that term. The appellee claims, however, that he has invented and secured by his patent a new and useful combination of mechanical elements to accomplish the desideratum which they were both seeking, and that the appellant has departed from the old combinations and devices, which were open to him, and has appro-

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priated and used the combination of elements claimed in and secured to him in his earlier patent, or a combination of some of these elements with obvious mechanical equivalents of others. The appellant insists that he has not used all the constituent elements of Schroeder's patent, and that the doctrine of mechanical equivalents has no application, or a very limited application, to a case of an infringement of a patent for a combination, and that under this rule he is not an infringer.

It is not true, however, that the doctrine of mechanical equivalents is inapplicable to an infringement of a combination. A novel combination of old elements which accomplishes a new and useful result, or one which accomplishes an old result in a new and better way, is as much entitled to a patent under the statutes of the United States as an invention of a machine or a composition of matter, and a patent for it is protected by every rule and presumption of law applicable to any infringement of this character. It may be, and undoubtedly is, true that the doctrine of mechanical equivalents has a very limited application to a large majority of patents for combinations; but that is not because they are patents for combinations, but because they are not primary inventions. The general rule of the patent law is that one who invents and secures a patent for a machine or combination which first performs a useful function is thereby protected against all machines and combinations which perform the same function by equivalent mechanical devices; but one who merely makes and secures a patent for a slight improvement on an old device or combination, which performs the same function before as after the improvement, is protected against those only who use the very device or improvement he describes and claims, or mere colorable evasions of it. Adams Electric Ry. Co. v. Lindell Ry. Co., 77 Fed. 432, 440, 23 C. C. A. 223, 231, 40 U. S. App. 482, 498; Stirrat v. Manufacturing Co., 61 Fed. 980, 981, 10 C. C. A. 216, 217, 27 U. S. App. 13, 42; McCormick v. Talcott, 20 How. 402, 405, 15 L. Ed. 930; Railway Co. v. Sayles, 97 U. S. 554, 556, 24 L. Ed. 1053. In other words, the term "mechanical equivalent," when applied to the interpretation of a pioneer patent, has a broad and generous signification; but where it is applied to a slight and almost immaterial improvement in the progress of an art it has a very narrow and limited meaning, while in its application to all that great mass of inventions which falls between the two extremes its significance is proportioned to the character of the advance or invention under consideration, and is so interpreted by the courts as to protect the inventor against piracy and the public against unauthorized monopoly. This general rule of law, like every other principle of jurisprudence, applies equally to all patents, whether for combinations, machines, or compositions of matter. In the very nature of things, patents for combinations are generally issued when the art to which they relate is old, when other means have been used to accomplish the desired result, and when the state of the art is such that the field for invention is narrow. The very fact that they are combinations of old elements indicates that they usually come into existence when the art they illustrate is not new. The result is that

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in most cases patents for combinations secure secondary inventions, mere improvements in the means of doing those things which had been well done before; and for this reason, and not because they are patents for combinations, rather than for machines, they are generally not entitled to a broad application of the doctrine of mechanical equivalents. If, however, one invents and secures a patent for a new combination of old mechanical elements which first performs a useful function, he is protected against all machines and combinations which perform the same function by equivalent mechanical devices to the same extent and in the same way as one who invents and patents a machine or composition of matter of like primary character. The doctrine of mechanical equivalents is governed by the same rules and has the same application when the infringement of a patent for a combination is in question as when the issue is over the infringement of a patent for any other invention. Imhaeuser v. Buerk, 101 U. S. 647, 653, 25 L. Ed. 945; Griswold v. Harker, 62 Fed. 389, 391, 10 C. C. A. 435, 437, 27 U. S. App. 122, 150; Thomson v. Bank, 53 Fed. 250, 253, 3 C. C. A. 518, 521, 10 U. S. App. 500, 509; Seymour v. Osborne, 11 Wall. 516, 542, 548, 20 L. Ed. 33; Gould v. Rees, 15 Wall. 187, 189, 21 L. Ed. 39; Fay v. Cordesman, 109 U. S. 408, 420, 3 Sup. Ct. 236, 27 L. Ed. 979; Water-Meter Co. v. Desper, 101 U. S. 332, 25 L. Ed. 1024; Gage v. Herring, 107 U. S. 640, 2 Sup. Ct. 819, 27 L. Ed. 601; Machine Co. v. Murphy, 97 U. S. 120, 24 L. Ed. 935; National Cash Register Co. v. American Cash-Register Co., 53 Fed. 367, 373, 3 C. C. A. 559, 565, 3 U. S. App. 340, 357; Belding Mfg. Co. v. Challenge Corn-Planter Co., 152 U. S. 100, 14 Sup. Ct. 492, 38 L. Ed. 370.

Now, the devices used by the appellant were not identical with those described in the patent to the appellee, and thus the infringement resolves itself into the question whether or not the field for invention was so broad when the appellee secured his patent, and his invention was so striking and meritorious, that the mechanical elements used by Brammer in his later combination are really the mechanical equivalents of those described by Schroeder in his patent, under the rules of law to which we have adverted. The respective devices of the two parties are best shown by the following drawings, the first of which illustrates the combination of the appellee, and the second that of the appellant:

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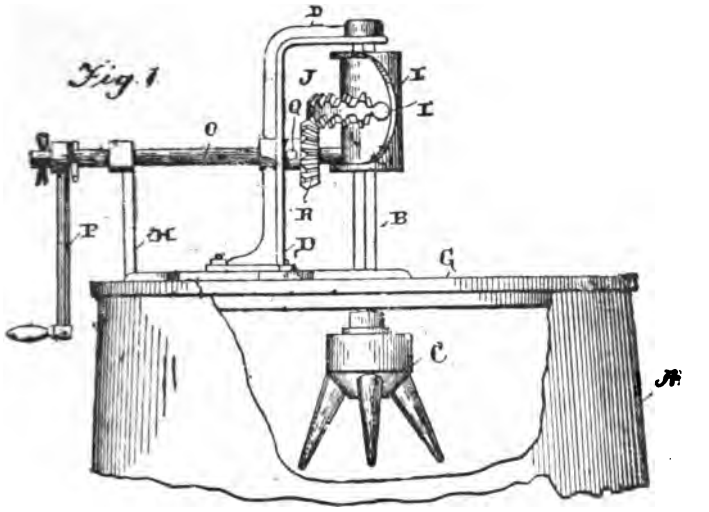

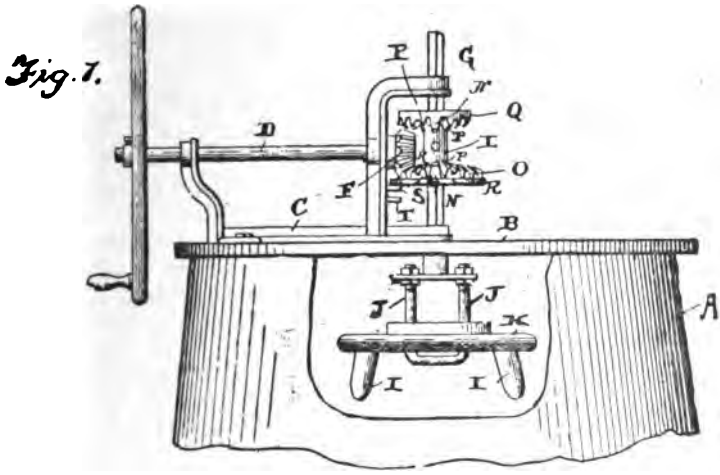

The machine of the appellee is operated by revolving the shaft, O, and the pinion, R, thereon continuously in the same direction. The vertical shaft, B, is angular in form above the cover of the washtub, and the cylinder or sleeve, I, is provided with a corresponding opening, so that it will slide vertically on the shaft, B, and yet, when revolved, will turn the shaft with it. This cylinder is provided with a double row of cogs, J. The number of cogs in each row corresponds with the number of cogs on the pinion, R. At each end of this double row of teeth is a large tooth, L, and in the pinion, R, there is a corresponding space prepared to receive this large tooth as the pinion rotates. A portion of the cylinder, I, in the form of an ellipse, is cut away or recessed, and the end of the shaft, O, is extended into this recess in the cylinder, so that as the latter is revolved the end of the

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shaft will constantly engage with the flange of the cylinder formed by the recess, and will in this way keep the cogs of the pinion and the cogs of the double row of teeth in mesh. If the cylinder, I, is in the position shown in the drawing, and the shaft, O, is revolved, the pinion, R, rotates the cylinder and the shaft, B, within it, in one direction, until the large tooth, L, strikes the space in the pinion prepared for it, when the pinion carries the double row of teeth and the cylinder downward on the shaft, B, until the row of cogs on the upper side of the double row meshes with the cogs on the lower side of the pinion, when the pinion will rotate the cylinder and the shaft within it in the opposite direction, until the large tooth, L, on the other side of the row, is reached. The latter tooth, when reached, falls into the space prepared for it in the pinion, and then the pinion raises the cylinder on the shaft, B, until the lower row of teeth meshes with those on the upper portion of the pinion, and thus a continuous planetary motion around the pinion is imparted to the double row of teeth, and a reciprocating rotary motion to the cylinder and the shaft within it, without moving the shaft vertically in either direction. The claim of the appellee, which was found to be infringed by the court below, reads in this way:

"An operating shaft having a rotary reciprocating motion, a cylinder placed upon the shaft and having a sliding movement thereon, and through which cylinder motion is alone communicated to the shaft, and a double row of teeth or cogs upon the cylinder, extending at an angle to the shaft, combined with a driving shaft having means for revolving it attached to one end, and a wheel for engaging the teeth on the cylinder at the other, the driving shaft being driven continuously in one direction, substantially as shown."

Turning, now, to the cut of the device of the appellant, the shaft, D, and the pinion, F, on the end of it, constitute the driving force, and are continuously revolved in the same direction. The vertical shaft, G, is angular in form above the cover of the washtub, and the spool-shaped sleeve or cylinder, L, is provided with a corresponding opening, so that it will slide vertically on the shaft, G, and yet, when revolved, will rotate the shaft with it. The ends of this cylinder are formed into two beveled wheels, with cogs facing each other suitable to engage with the cogs of the pinion, F. Among the teeth upon each of these wheels are three which are higher than those on the remainder of the wheel, the middle one of which, N, is higher and wider than the other two, so that when it strikes the teeth of the pinion it does not insert itself between them, but rides upon them, throws its wheel out of gear with the pinion, and causes the latter to mesh with the opposite wheel. The lower wheel has a flange, about three-quarters of the distance around it, which, by resting upon the lugs, S and T, respectively, supports the cylinder alternately in its higher and lower position as it is operated. The break in this flange and the large teeth upon the two wheels fall in the same vertical line. If the cylinder, L, is in the position shown in the cut, and the shaft, D, is revolved continuously in the same direction, the pinion, F, rotates the cylinder, L, and the shaft, D, within it, in one direction, until the large tooth, N, in the lower wheel of the cylinder, strikes the pinion. When that tooth strikes upon the cogs of the pinion, it slides the cylinder downward on the shaft, G, disengages the pinion from the lower

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wheel, and meshes it with the upper wheel, and thus causes the cylinder and the shaft within it to rotate in the opposite direction until the pinion reaches the large tooth in the upper wheel. When that tooth is reached, it strikes on the cogs of the pinion, and forces the cylinder upward until the pinion is disengaged from the upper wheel and meshes with the cogs of the lower wheel, when the direction of the cylinder and of the shaft within it is again changed, and thus the continuous revolution of the horizontal driving shaft in one direction produces the reciprocating rotary motion of the vertical shaft by means of the sliding cylinder upon it.

It will be seen from this brief description of the two devices that each is a combination of (1) a horizontal driving shaft with a pinion on its end, (2) a vertical operating shaft of angular form above the cover of the tub, and (3) a cylinder which is provided with teeth adapted to engage the cogs of the pinion, and which slides upon and communicates motion to the operating shaft; that there is no substantial difference in the forms, functions, or methods of operation of the shafts and pinions of the two combinations; and that the only real question is whether or not the spool-shaped, gear-bearing cylinder of Brammer is the mechanical equivalent of the cog-bearing cylinder of Schroeder. The breadth of the field open to the appellee when he made his invention, and hence the breadth of the meaning of the term "mechanical equivalent" when applied to his combination, determines the answer to this question. In other words, the state of the art when Schroeder made his combination conditions the answer. Turning to the history of the prior art as it is disclosed by the record before us, we find these striking illustrations of its progress before, and of its state at the time, he made his invention:

On October 1, 1872, letters patent No. 131,902 were issued to George H. Pittman for an improved hoisting machine, in which reciprocating rotary motion was imparted to a draft roller or pulley by a driving shaft, which was continuously revolved in the same direction. In the machine described in this patent, a pinion provided with beveled gearing, located on the end of a horizontal roller or pulley, was made to engage alternately with each of two horizontal wheels, which faced each other, carried beveled gearing, and were secured to a vertical driving shaft. The pinion on the roller was placed between these wheels, which were so located that, when the cogs on the pinion were engaged with the gearing of one of these wheels, they would be disengaged from that of the other. The journal box of the roller nearest to the driving shaft was made vertically adjustable, and a lever was attached to it, by means of which the pinion could be raised and lowered, and thus could be made to mesh alternately with the wheels of the driving shaft. When the driving shaft was continuously revolved in the same direction, and the pinion was raised, by means of the lever, so that it engaged with the upper wheel, the roller was rotated in one direction, and when the pinion was depressed, so that it geared with the lower wheel, the roller was revolved in the opposite direction. Letters patent No. 327,059, issued on September 29, 1885, to Henry C. Barnard, for improvements in washing machines, shows a translation of the rotary motion of a horizontal shaft in one

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direction into a reciprocating rotary motion of the operating shaft of the washing machine by means of two half-cogged wheels on the driving shaft. These wheels were set on the driving shaft, facing each other, with the pinion of the operating shaft between them. About one-half of each wheel was provided with cogs, and the wheels were so placed on the shaft that the smooth portion of the face of each wheel was opposite the toothed portion of the face of the other. They were placed at such a distance from each other upon the shaft that the cogs on the pinion of the operating shaft between them engaged with the teeth on each wheel as the driving shaft was revolved. Thus, when the driving shaft was rotated continuously in one direction, the pinion first geared with one of the wheels, and was thereby revolved in one direction, until it reached the smooth portion of the face of the wheel, when it became disengaged therefrom and instantly meshed with the other wheel, which rotated it in the opposite direction, until it reached the smooth portion of that wheel, and was disengaged therefrom, and again caused to mesh with the first wheel, when the operation was repeated. The device shown by this patent to Barnard, or some slight modification of it, appears in patent No. 350,222, to Victor Vizet, issued on October 5, 1886, for an improvement in stirring and beating machines; in patent No. 328,262, to William T. Venable, on October 13, 1885, for a new and improved washing machine; in patent No. 444,737, to William Turnbull, on January 13, 1891, for improvements in washing machines; and in patent No. 451,091, to Gabriel Marian Walker, April 28, 1891, for gearing for washing machines. In patent No. 551,915, for an improvement in washing machines, issued to Alexander Webber on December 24, 1895, upon an application filed on August 20, 1894, a very complicated machine is described, in which a sliding sleeve on the operating shaft is made to cause the engagement of the shaft and sleeve alternately with two wheels, provided with beveled gearing and loosely placed upon the shaft, one above and the other below the sleeve. When in operation, these two wheels were driven in opposite directions by the continuous rotation in one direction of a driving wheel, and the sliding sleeve, by means of its vertical movement alternately up and down upon the shaft, was made to operate a clutching device, which fastened the shaft alternately to each wheel, and thereby revolved it first in one direction and then in the other. There are many other patents in the record, which have been carefully examined; but there are none which illustrate the question in issue more clearly than those which have now been reviewed.

It is obvious that there is no substantial difference in the principle or mode of operation of a vertical driving shaft imparting reciprocating motion to a horizontal operating shaft by means of cogwheels fastened upon it, and a horizontal driving shaft imparting reciprocating rotary motion to a vertical operating shaft by means of cogwheels fastened upon the latter. It is plain, from the illustrations to which reference has been made, that the alternate gearing of the shaft, to which the reciprocating rotary motion was to be imparted with two cogged wheels moving in opposite directions, was a common and well-known method of translating continuous into reciprocating ro-

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tary motion. "The principle of a machine is properly defined to be its mode of operation, or that peculiar combination of devices which distinguish it from other machines." Burr v. Duryee, 1 Wall. 531, 570, 571, 17 L. Ed. 650. Now, what was the principle of Schroeder's invention? What was the advance in the progress of the art which his combination marked? What was the peculiar combination of devices which distinguished his from all prior machines? It was the combination of the sliding cog-bearing cylinder, by which alone the reciprocating rotary motion was imparted to the operating shaft, with the old and familiar elements of his combination. The history of the prior art has been searched in vain for any device or machine in which a sliding actuating cylinder on the operating shaft, provided with cogs or cogwheels adapted to mesh with those of the driving wheel, is disclosed. The use of such a sliding cylinder to impart motion to the shaft, in combination with the other parts of this machine designated in the first claim of this patent, was new in the art; and the facts that its usefulness is not denied, and that the appellant has seen fit to depart from the many devices open to his use, and to adopt that of the appellee, strongly indicate that it marks a distinct and useful advance in the progress of this art. The appellee was not ignorant of the principle or mode of operation he was seeking to secure when he drew his specification and made his claim. They show that this was the peculiar principle or mode of operation which he described and sought to secure. He said in his specification:

"My invention relates to an improvement in means for operating washing machines, and it consists in a shaft which is revolved continuously in one direction by the operator, combined with an angular revolving shaft, which is made to revolve first in one direction and then in the other, and a vertically moving cylinder placed upon the angular shaft, and which is provided with a double row of teeth or cogs which extend partially around the cylinder, and which mesh with the pinion upon the driving shaft for the purpose of causing the angular shaft to revolve."

And he claimed—

"An operating shaft having a rotary reciprocating motion, a cylinder placed upon the shaft and having a sliding movement thereon, and through which cylinder motion is alone communicated to the shaft, and a double row of teeth or cogs upon the cylinder, extending at an angle to the shaft, combined with a driving shaft."

It is plain that the cog-bearing, actuating, sliding cylinder was the element of this combination which embodied its principle and distinguished its mode of operation from those which preceded it. This principle has been appropriated by the appellant. He has adopted this new mode of operation. He has placed in his machine this sliding cylinder, by which alone motion is imparted to the operating shaft. He has placed upon that cylinder two rows of cogs, which extend at an angle to the cylinder and mesh with the pinion of the driving shaft. These two rows of teeth are simply the double row of Schroeder separated into two parts and placed facing each other on either side of the pinion of the driving shaft. The two rows of Brammer and the double row of Schroeder perform the same function, operate upon the same principle, and produce the same effect. They mesh

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with the driving pinion, and by this means revolve the cylinder and its inclosed shaft alternately in opposite directions.

It is contended that the appellant is not guilty of infringement because he does not use the specific means described by Schroeder for the purpose of holding the cogs on his cylinder in mesh with the driving pinion; that he has not imported into his machine the elliptical recess in the cylinder, the extension of the driving shaft beyond the pinion to engage with the flange formed by the recess, the large tooth at each end of Schroeder's double row, the enlarged space in the pinion prepared to receive this tooth, and a number of teeth in his pinion corresponding with the number of teeth on one side of Schroeder's double row. But these are mere details of construction; mere means of union and operation of the elements of the combination, pointed out in the specification as one method of accomplishing this purpose interchangeably with obvious mechanical devices appropriate to reach the same end. They are not substantive constituent elements of the combination described and claimed by the appellee. They are not essential elements of that combination. What Schroeder described and claimed here was the cog-bearing, actuating, sliding cylinder in combination; not the specific form of that cylinder which he described, nor the identical means he pointed out to hold its cogs in mesh with the pinion, but this tooth-bearing, actuating, sliding cylinder in combination with the driving shaft and pinion and the angular operating shaft of the washing machine. He does not describe the form of his cylinder as a part of his invention. He does not claim it as such. He says in his specification, "This cylinder will preferably be made in the form here shown;" and this is to say, in effect, that this is one of the forms in which this essential element of the combination, the tooth-bearing, sliding cylinder, may be made. It is true that the cogs on the cylinder of Brammer are not held in mesh with the pinion by the identical means pointed out by Schroeder; but the use of the means which the latter here pointed out he did not secure or attempt to secure to himself in the first claim of his patent, nor was his right to the use of the combination there claimed restricted to its use by these identical means. A description in a specification of details which the claim does not make elements of the combination, and which are not essential to it, simply points out one method of using it, and does not restrict the claim to these details. The mechanical devices described by the patentee for holding the teeth of the cylinder in mesh with the pinion were not essential to the combination, because the problem of so holding them in gear was simple, and the state of the art disclosed many devices adequate to accomplish that result.

One who appropriates a new and valuable patented combination cannot escape infringement by uniting or operating those elements by means of appropriate mechanical devices which differ from those which are pointed out for that purpose, but which are not claimed in the patent. Deering v. Harvester Works, 155 U. S. 286, 302, 15 Sup. Ct. 118, 39 L. Ed. 153; City of Boston v. Allen, 91 Fed. 248, 249, 33 C. C. A. 485, 486. The appellant has used obvious mechanical devices to unite and operate the appellee's combination. They accom-

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plish the same purpose as those described in the patent, and he cannot appropriate to himself this combination and all its elements, and then escape infringement because he unites or operates them by common mechanical devices which differ from, but accomplish the same purpose as, those described in the patent. The combination of the appellant contains the very principle of the appellee's invention; the new mode of operation which he conceived, described, and claimed in his patent; the cog-bearing, sliding cylinder, by which alone motion is imparted to the operating shaft, in combination with the angular shaft, the driving shaft, and its pinion. It contains every element of the patented combination, except the sliding cylinder, in the identical form described in the specification of the appellee, and it contains the mechanical equivalent of the sliding cylinder. While the sliding cylinder of Brammer is not in the same form as that of Schroeder, it is the same thing. It performs the same function and attains the same result, the imparting of reciprocating rotary motion to the shaft, by the same mode of operation, and as this principle and mode of operation were new, so far as is disclosed by this record, in the art to which the patent of Schroeder relates, his cylinder falls within the fair meaning of the term "mechanical equivalent," and it should be applied to the combination in suit.

It is said that the subsequent patent to the appellant raises the presumption that his combination is new, and that it does not infringe that of the appellee; and this proposition may be conceded. Corning v. Burden, 15 How. 252, 271, 14 L. Ed. 683. In this case, however, it is met by a counter proposition of not less weight. It is that where the chancellor has considered conflicting evidence, and made his finding and conclusion thereon, they must be taken to be presumptively correct, and unless an obvious error has intervened in the application of the law, or some serious and important mistake has been made in the consideration of the case, the findings and decree should not be disturbed. The circuit court twice considered this case, and held that the actuating, sliding cylinder of the appellant, by which alone reciprocating rotary motion was imparted to the operating shaft, was the mechanical equivalent of the sliding cylinder of Schroeder; that the appellant's combination contained every element of that of the patentee; that it appropriated the principle and mode of operation which distinguished the latter's combination from the devices which had preceded it; and that the appellant must be held to be guilty of infringement. That court supported its findings and decree by able and exhaustive opinions, which are reported in 98 Fed., at pages 880 and 886. A thoughtful consideration of the law applicable to this case and a careful review of the evidence presented in it has failed to convince us that the conclusion of the court below was induced by any error of law or mistake of fact, and it must accordingly be sustained.

In the court below the appellant strenuously contended, and in some parts of the briefs of his counsel he still seems to maintain, that the first claim of Schroeder's patent, which has been under consideration, was void: (1) Because it did not include the mechanical means for holding the gearing of the pinion in mesh with that of the cylinder; that is to say, the flange on the cylinder, the extension of the

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driving shaft beyond its pinion so as to engage with the flange, the large tooth at the end of the double row, and the enlarged space in the pinion for its reception. (2) Because the extension of the driving shaft beyond the pinion, though clearly shown in the drawings, was not specifically mentioned in the specification. (3) Because, without these or other mechanical devices, the combination would be inoperative. (4) Because some of these devices were secured to the appellee by another claim of his patent, which the appellant does not infringe. This position was not sustained by the circuit court, and since the delivery of its opinion counsel for the appellant seem to retain but little faith in its soundness, since one of their briefs contains this declaration:

"Now, while we do not very seriously contend against the holding of the court that plaintiff's patent is not void for the want of sufficient statutory description, because it would not practically benefit defendant if plaintiff should lose his patent, we do strenuously oppose the reasoning of the court and the application of the liberal construction rule to bring about that end, and at the same time to hold the defendant's patent void."

In other words, the argument in this court is, not so much that this claim is void because it does not include these means of combining the teeth of the cylinder with those of the pinion, as it is that these means are essential elements of the combination, and therefore restrict the claim to a combination operated by these identical devices. The reasons why the latter contention ought not to prevail have already been stated. The former is not more tenable. The drawings were a part of the specification of this patent, both by its terms and by the provisions of the statutes. Rev. St. § 4889. It is true that neither they nor the specification can be read to expand the claim; but the specification and the drawings must be read together, and given their obvious force and meaning, for the purpose of determining what devices are pointed out and described therein. When the specification and drawings of this patent are so read, the extension of the driving shaft beyond the pinion so that it will engage with the flange on the cylinder, and every other mechanical device requisite to unite the essential elements of the combination claimed, and to make it complete and operative, are plainly pointed out and described. By the first claim of this patent the invention secured by it was not limited or restricted to a combination which included every mechanical device—every detail of construction—described in the specification and drawings; nor was it essential to the validity of that claim that it should include the obvious means of uniting and operating the essential elements of the combination it secured. The purpose of the drawings and specification of a patent is to plainly describe the machine or combination invented, so that one skilled in the art can construct and operate it. The purpose of a claim of a patent is to designate the limits of the machine or combination which the patentee has invented or discovered. A claim for a machine or for a combination of mechanical devices is not insufficient or invalid because it does not include mechanical devices for uniting and operating the elements of the machine or combination which would readily suggest themselves to mechanics skilled in the art, or which are described in the specifica-

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tion and drawings. Loom Co. v. Higgins, 105 U. S. 580, 585, 591, 26 L. Ed. 1177; Deering v. Harvester Works, 155 U. S. 286, 302, 15 Sup. Ct. 118, 39 L. Ed. 153.

Nor is the first claim of the patent void because it does not include some of the specific devices which are described in the specification and which are secured by the second claim of the patent. A patentee is not required to state in a single claim all that he has described and invented. The first claim of the patent clearly specifies a novel and patentable combination of mechanical elements, which is operative both by the means pointed out in the specification and by obvious mechanical devices appropriate for the purpose of holding its various elements in union; and there was no error in the decree which sustained it. The decree below is affirmed, with costs.

(106 Fed. 935.)

DODGE MFG. CO. v. COLLINS et al.

(Circuit Court of Appeals, Fourth Circuit. February 7, 1901.)

No. 322.

1. PATENTS—INFRINGEMENT—SPLIT WOODEN PULLEYS.
   The Sanborn patent, No. 275,947, for a split wooden pulley, claim 1, is entitled to a narrow construction only, and is not infringed by a spoke pulley.
2. SAME.
   The Philion patent, No. 468,490, for an improvement in the process of constructing wooden pulleys, which consists essentially in uniting segments to form rings, and then uniting the rings together by means of glue and pressure, is void for want of patentable novelty.
3. SAME.
   The McNeal patent, No. 351,064, claims 1 to 6, which cover split wooden pulleys and a mode of constructing the same, show merely combinations of old and well-known devices, which produce no new result, and are void for lack of patentable invention.

Appeal from the Circuit Court of the United States for the District of West Virginia.

Lysander Hill (John W. Hill, on the brief), for appellant.
W. W. Van Winkle, for appellees.

Before FULLER, Circuit Justice, and PAUL and BRAWLEY, District Judges.

PAUL, District Judge. This cause is here on appeal from a decree of the circuit court for the district of West Virginia. The appellant was the complainant in the court below, and filed its bill alleging infringement by the defendants of certain letters patent belonging to the complainant, and praying an injunction and account. The defendants answered, denying the validity of the complainant's patents and the infringement of the same. The court below dismissed the bill. The patents involved are No. 275,947, granted to Gustavus B. Sanborn, April 17, 1883; No. 351,064, granted to Charles McNeal, October 19, 1886; and No. 368,492, granted to George Philion, August 16, 1887. All of these patents are for improvements in split wood

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pulleys and the manufacture of the same. The claim of the Sanborn patent, No. 275,947, which, it is alleged the defendants are infringing, is as follows:

"A transversely divided or split pulley, having its sections constructed upon their surfaces to form a serpentine or zigzag joint, and receive the shaft which carries the pulley in between them."

The claims in question of the McNeal patent (1, 3, 4, 5, and 6, No. 351,064) are as follows:

"(1) The mode or procedure in building a wooden split pulley as described, which consists in first building the central part of the rim; second, in dividing the same transversely on an irregular line to make an interlocking joint; third, in adding a section to each edge of said central part, and dividing the same with a straight saw, whereby the adjoining ends of the rim are provided with interlocking portions." "(3) A pulley provided with an arm or spoke having at its ends wedging dovetailed tenons, fitting in a dovetailed mortise in the pulley rim and the fastening edges. (4) A separable wooden pulley, having its rim divided on an irregular line to form interlocking portions at adjoining ends, and having its spokes or arms at their outer ends embedded in the rim with dovetailed tenons and mortises, substantially as set forth. (5) A split pulley, having a section, A, and the arm, C, mortised into the same near its end, and provided with a stay bolt, K, extending from said arm to the pulley rim at a distance from its end. (6) A split pulley, having the rim, A, and the arm, C, mortised into the same near its point of division, and provided with the stay bolt, K, and the anchoring pin, L, inserted in the rim."

The Philion patent, No. 468,490, is for an improvement in the process of constructing wooden pulleys, which consists, essentially—First, in uniting a proper number of segments at their abutting ends to constitute rings capable of being handled as entireties; and, second, in assembling a proper number of said rings with glue between them and subjecting the whole to heavy pressure until the adhesive has solidified.

The claim of the alleged infringing patent, No. 406,067, is for a pulley composed of two rim sections, which are joined at their ends by a horizontal and vertical tongue and groove, each rim section comprising a plurality of rings that are joined at their ends by dowel blocks, the two arms fastened to the said rim sections by bolts and dovetailed tenons and cavities; said arms having notches midway of their ends, with sloping sides; the hub composed of halves, each half fitting in said notches, and having sloping sides, and the bolts pressing through the said arms for drawing them and the said rim sections together, substantially as and for the purpose described.

The claim of the Sanborn patent relates to a split wooden pulley, whereas the Sprinkle pulley is a wooden split arm or spoke pulley. This distinction was made by the court in Manufacturing Co. v. Atkins, 20 C. C. A. 415, 74 Fed. 241. In that case the court held that the first claim of the Sanborn patent must be limited to "a transversely divided or split pulley having its sections constructed upon their meeting surfaces to form a serpentine or zigzag joint, and to receive the shaft which carries the pulley in between them, substantially as specified." The court held in that case, as we find by the record in this, that "split wooden" pulleys were well known at the date of Sanborn's patent. It was then old in the art to dowel together the halves of such pulleys where the halves were formed separately, or the unit sawed into halves. It was also old to accomplish this doweling by

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means of tongues and grooves upon the faces of the halves. It was also old to interlock two wooden surfaces by means of recesses in the one and projections or dowel pins in the other. It was also old to divide bodies in a serpentine or irregular course, producing zigzag surfaces interlocking without further adjustment. The court held in that case that the claim of the Sanborn patent was not infringed by a spoke pulley, the meeting surfaces of which interlocked at the rim by means of a series of projections and recesses. The holding of the court in that case has our concurrence, and, it appearing that the Sprinkle patent is for a spoke pulley, it does not infringe the claim of the Sanborn patent.

The claim of the Philion patent is for an improvement in the process of construction of wooden pulleys. This consists in uniting a proper number of segments at their abutting ends to constitute individual rings, capable of being handled as entireties; then in assembling a proper number of said rings with glue between and subjecting the whole to heavy pressure until the adhesive has solidified. There are but two steps in the formation of the rim of the pulley. One of these is the application of glue to wooden surfaces to secure their adhesion; the other is securing this adhesion through pressure. The statement of the means employed is sufficient to show the absence of novelty in what is claimed as an invention. Both are old and familiar in the work of cabinet makers and carpenters. In Dodge Mfg. Co. v. Ohio Val. Pulley Works (C. C.) 101 Fed. 584, the court held this patent invalid on the ground that the method of uniting segments together and rims together by means of glue did not constitute a process, but involved only mechanical operation. It further said, "What Philion has done is but the carrying forward of old ideas, and does not amount to invention."

The first claim of the McNeal patent consists in first building the central part of the rim by successive rings glued together, as in the Philion patent, which, we have said, is old in the art. Then this rim is divided transversely on an irregular line, making an interlocking joint. Then a section is added to each edge of the central part, which is divided with a straight saw, whereby the adjoining ends of the rim are provided with interlocking portions. The irregular line dividing the central rim is identical with that dividing the Sanborn pulley, and is, as we have seen, old in the art. In Dodge Mfg. Co. v. Ohio Val. Pulley Works, supra, in which the patent was involved, Judge Lurton said:

> "That it was not new to unite individual segments to form a ring or wheel by gluing them together at their abutting ends is abundantly shown by the record. Neither was it new to unite wooden structures by means of glue under compression. No new result was produced by the method of the patent. That pulleys thus made may have been more durable than those united by nails or doweling, or by glue with nails, or by glue without pressure, may be conceded. But such improvement is not invention."

The overlapping outside section is not new. If ever patentable, it had been anticipated in the patent of Bowsher, relating to improvements in the construction of split or compound pulleys, No. 307,171, October 28, 1884. This claim does not involve a patentable novelty.

The third claim of the McNeal patent is on the arm or spoke, hav-

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ing at its ends the wedging dovetailed tenons, fitting in a dovetailed mortise in the pulley rim, and the fastening wedges. The fourth claim is for spokes or arms of the pulley at their outer ends embedded in the rim of the pulley with dovetailed tenons and mortises. The fifth is for an arm mortised into a section of the pulley rim near its end, provided with a stay bolt extending from the arm back to the rim at a distance from its end. The sixth is for an arm provided with a stay bolt and anchoring pin inserted in the rim of the pulley. None of these devices possess the merit of invention. The spoke bar or arm of the pulley, with dovetailed ends or tenons, the mortises, the wedges, the glue to keep them in place, the stay bolt attached to the pin in the rim of the pulley, are all shown by the testimony to be old devices, and long in previous use in the construction of pulleys. The effect of this use of old devices in the construction of the McNeal split wood pulley was to strengthen it, and thus add to its durability; but it did not produce a new result or effect. The doctrine that a combination of old devices in a patent to be sustained must produce a new result is thus stated in Reckendorfer v. Faber, 92 U. S. 344, 23 L. Ed. 719:

"The combination, to be patentable, must produce a different force or effect, or result in the combined forces or processes, from that given by their separate parts. There must be a new result produced by their union. If not so, it is only an aggregation of separate elements."

Hailes v. Van Wormer, 20 Wall. 353, 22 L. Ed. 241; Pickering v. McCullough, 104 U. S. 310, 26 L. Ed. 749.

In Locomotive Works v. Medart, 158 U. S. 68, 15 Sup. Ct. 745, 39 L. Ed. 899, the supreme court, speaking through Mr. Justice Brown, of the patent involved in that case, said:

"In short, this is a patent only for superior workmanship, and, within all the authorities, invalid. This court has repeatedly stated that all improvement is not invention. If a certain device differs from what precedes it only in superiority of finish, or in greater accuracy of detail, it is but the carrying forward of an old idea, and does not amount to invention."

In our opinion, none of the claims in the several patents proceeded on by the complainant has been infringed by the defendants. The decree of the circuit court dismissing the bill is affirmed.

(106 Fed. 945.)

ELPHICKE et al. v. WHITE LINE TOWING CO.

WHITE LINE TOWING CO. v. ELPHICKE et al.

(Circuit Court of Appeals, Eighth Circuit. March 14, 1901.)

No. 1,465.

1. COURT OF ADMIRALTY—FINDING OF FACT PRESUMPTIVELY CORRECT.

   A finding of fact by a court of admiralty upon conflicting evidence will not be reversed or modified by an appellate court unless there is a clear preponderance of evidence against it.

2. AGREEMENT FOR COMPENSATION BY THE DAY FOR SALVAGE SERVICES ENFORCEABLE.

   A contract by one party to pay at all events, and by the other to receive a fixed or deserved compensation for salvage services, is as conclusive and enforceable as any other valid contract.

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2 SAME—BURDEN OF PROOF.

The burden of establishing such an agreement by a fair preponderance of evidence is upon the owners or claimants of the vessel or cargo who allege it.

(Syllabus by the Court.)

Appeals from the District Court of the United States for the District of Minnesota.

H. R. Spencer (F. E. Searle, on the brief), for C. W. Elphicke and others.

Theo. Hollister (H. J. Grannis, on the brief), for White Line Towing Company.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. On the night of November 22, 1898, the steamship Arthur Orr, laden with flour, copper, and shingles, was driven upon the rocky shore of Lake Superior, near the mouth of the Baptism river, so disabled that she sank. The White Line Towing Company and the Inman Tug Company, two corporations engaged in towing and assisting vessels upon the Great Lakes, found her at this place only partially submerged, took a portion of her cargo to Duluth on barges, and then raised and towed her to the same port. Each of these corporations furnished the services of tugs, barges, pumps, diving outfits, and men in the performance of this undertaking. The Inman Tug Company furnished its services under a contract made with the agent of the owners of the steamship about November 24, 1898, before it entered upon the undertaking to supply its tugs, barges, pumps, and other apparatus, for reasonable compensation by the day, and it has been paid according to this agreement. The White Line Towing Company and the captains of its tugs libeled the vessel and cargo, and the court below found that this company was entitled to recover $3,000 salvage of the steamship and $7,500 salvage of the cargo. A decree was accordingly rendered against the claimants of the vessel and cargo, C. W. Elphicke and others, and their sureties, for these amounts, and both parties appealed from this decree. The claimants insist that the court below was in error because it failed to find from the evidence that the towing company agreed to render its services for a per diem compensation not exceeding the agreed rate between the agent of the steamship and the Inman Tug Company, and because it did not also find that the towing company had been guilty of embezzlement of a portion of the cargo, and had been so negligent in the care of it that it was entitled to neither salvage nor compensation. The libelants urging their appeal maintain that the court was in error because it did not find that the towing company was entitled to salvage to the amount of $20,000, instead of to the amount of $10,500.

The specifications of the parties assail the findings of fact of the court below, which are based upon contradictory evidence, and they cannot prevail unless they are sustained by a clear preponderance of the testimony. A finding of fact by a court of admiralty upon conflicting evidence will not be reversed or modified by an appellate

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court unless there is a clear preponderance of evidence against it. The City of Naples, 69 Fed. 794, 796, 16 C. C. A. 421, 424, 32 U. S. App. 613, 619; The Grafton, 1 Blatchf. 173, Fed. Cas. No. 5,655; Post v. Steamship Co. (C. C.) 48 Fed. 565; The Jersey City, 51 Fed. 527, 2 C. C. A. 365, 1 U. S. App. 244; Levy v. The Thomas Melville (C. C.) 37 Fed. 272; The Saratoga (C. C.) 40 Fed. 509.

The first question for consideration in this case is whether the towing company furnished the services of its tugs, barges, machinery, and men for salvage or for compensation by the day. The steamship lay in such danger, and the services rendered were so timely and efficient, that there is no doubt that the company was entitled to salvage in the absence of a contract for other compensation. The claimants alleged in their answer, and they produced evidence tending to prove, that the towing company agreed to render its services for compensation of the same character and at the same rate that others who were employed in rescuing the vessel were to receive; and that the Inman Tug Company, which was the only party which rendered similar services, agreed to receive, and was paid, the customary compensation by the day. The towing company denied these averments, and produced testimony which contradicted this evidence. The burden of establishing the agreement by a fair preponderance of evidence was upon the claimants. But a fair contract by one party to pay at all events, and by the other to receive, a fixed or a reasonable compensation for salvage services, is as conclusive and enforceable as any other valid contract. The Elfrida, 172 U. S. 186, 192, 196, 19 Sup. Ct. 146, 43 L. Ed. 413; The Comanche, 8 Wall. 448, 477, 19 L. Ed. 397; Post v. Jones, 19 How. 150, 160, 15 L. Ed. 618; The Helen and George, Swab. 368; The Roanoke (D. C.) 50 Fed. 574, 576; The Emulous, 8 Fed. Cas. 704, 706 (No. 4,480); The Independence, 13 Fed. Cas. 9, 10 (No. 7,014); Harley v. Bars of Iron, 11 Fed. Cas. 525, 526 (No. 6,068); The Delambre (C. C.) 9 Fed. 775, 776. There are three methods of compensation for salvage services. They are: (1) By a share of the salvage in cases where the services are voluntarily rendered, and there is no express contract; (2) by the payment of an agreed compensation in case of success only; and (3) by the payment at all events of an agreed compensation, or a quantum meruerunt, under a contract to that effect. The third is the common and customary method upon the Great Lakes. The Elfrida, 172 U. S. 192, 19 Sup. Ct. 146, 43 L. Ed. 413. There is, therefore, nothing strange or improbable in the contract which the claimants allege was made with the towing company, to the effect that it would render its services for the same reasonable compensation by the day that the agent of the steamship and of its owners agreed to pay to other wreckers who furnished like assistance. On the other hand, such an agreement was the customary and probable contract under which such services were usually rendered at the place where, and under the circumstances in which, these parties found themselves.

When the towing company first appeared upon the scene, the steamship was in no great extremity, in no danger of immediate destruction or loss. She had lain quietly on the shore for 36 hours,

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and her master had already engaged the manager of the Inman Tug Line to go to Duluth, a distance of 56 miles, to report her condition to her agent there, to act under his direction, and to return, if possible, with a wrecking outfit to relieve her. It was about 2 o'clock on the morning of November 23, 1898, that this steamship was cast upon the shore and sank in shallow water. In the afternoon of that day B. B. Inman, the manager of the Inman Tug Company, then in command of one of its tugs, went to the steamship, and her master, Capt. Orville Green, engaged him to proceed at once to Duluth to make this report and obtain this aid. He went, arrived in Duluth on the night of November 23d or the morning of November 24th, reported to the agent of the owners of the steamship, and agreed with him that he would proceed to render assistance to the steamship, and that his compensation should be a reasonable amount per day for the services of each tug, lighter, pump, and other thing which his company furnished. Under this agreement the tug company worked and was paid. On the night of November 25, 1898, Inman arrived at the steamship again with a tug, a scow, and two pumps. He had sent before him another tug, a barge, and about 80 men. From the time of their arrival until the steamship was towed to Duluth on December 1, 1898, his company was active and efficient in preserving the ship and her cargo. On the afternoon of November 24, 1898, Capt. Singer, the manager of the White Line Towing Company, arrived at the steamship with a tug, a barge, and about 7 men. Neither he nor his company had been requested, after the disaster, by any of the agents or representatives of those interested in the steamship or cargo, to render them any assistance; but one of the agents of some of the underwriters had about a year before told him that when any of the vessels in which they were interested met with misfortune he wished him to go to their assistance as soon as he was able. Singer tendered to the master of the Orr the services of his tug and barge, and informed him that he had been directed by the underwriters to come to his aid. The master replied that he had engaged the manager of the Inman Tug Line to go to Duluth and return with the wrecking outfit of his company to save the ship and cargo. Thus far the facts which have been recited are established without dispute. The controversy relates to the transactions which followed. The master of the Orr, Capt. Green, testified that before Singer was permitted to go to work, and after he had informed him that he had engaged the Inman Tug Company, he asked him what his bills would be, and he replied that he would settle the same as the other wreckers. Thomas Casey, the mate of the Orr, relates the important part of this conversation in this way: "And Capt. Green says to him, he says, 'Inman is to be down; was here; and he is coming down with the wrecking outfit.' He says, 'Captain, let me go to work until he comes, and,' he says, 'my bills won't be no larger than his.' And he says, 'If they don't want me, I will go with what I have got.'" Casey also testified that when Capt. Singer was taking a second barge load of the cargo from the steamship he heard him say: "If they act the square thing with me, I will act square, and

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charge them only the same as Inman, and, if not, I am going to charge them salvage. I will make them pay salvage on the first load." Hare, the wheelman on the Orr, testified that Capt. Singer said in this conversation that, "if Capt. Inman came down, and he was in his way, why he would get out of the way; and, moreover, he said that it would not cost any more—he would not charge any more—than Capt. Inman was charging." No one who heard this conversation, except Capt. Singer, gives any different version of it, and he admits that he had the conversation, that the master of the Orr informed him that he had engaged the Inman Tug Company before he permitted him to commence to unload the steamship, but he denies that anything was said in the conversation about his bills or his compensation. As soon as the wreck of the steamship became known, the underwriters sent Capt. Killoran to Baptism river to take charge of the work of saving the property, and when he arrived there he found Capt. Singer engaged with his crew in loading his barge the second time. One of the witnesses testified that at this time he overheard the following conversation between Killoran and Singer: Killoran commenced by saying: "I am running this thing. I am the boss in this thing. Now, I want to know whether you are working for salvage or for day wages. If you are working for salvage, take your outfit and get away from here." "Well," Singer says, "I expect to have pay for my work." "Well, what pay do you expect to have? Do you expect to work for salvage or for pay?" "Well, I expect to have the same as others are getting." "Well," he says, "if you are willing to work for the same as others are getting, you can stay here and work. If you expect you are working for salvage, get away from here." "Well," he says, "I expect to get the same as the rest are getting." "Well," he says, "all right. Stay here and load your lighter." When Singer was asked to state this conversation, he testified: "He asked me some question about the price, and I told him that I would expect the going rates for such work, and that I couldn't work down there at that time of the year as cheap as we did in the harbor. There was nothing said about Inman's rates, or anything of the kind." He also testified that Capt. Killoran ordered him to send for another pump, and guarantied him five days at the usual price of $40 per day. This is all the evidence upon the issue whether or not the towing company agreed to render its services for the customary per diem compensation, instead of for salvage, and it seems to our minds very persuasive that such a contract was made. Compensation by the day was the usual and probable method for paying for such services on the Great Lakes. It was the way in which the Inman Tug Company, the only other wrecker that rendered like services, agreed with the agent of the owners of the steamship that it should receive its compensation. Three witnesses testified, and but one denied, that the towing company promised that it would settle for its services on the same basis as, and that its charges should be no more than, those of the others engaged upon the wreck, before it was permitted to commence its work. One witness testifies that the agent of the underwriters notified the manager of this towing company to cease his work, and to leave the wreck,

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if he expected salvage, and that he was permitted to continue only after he had declared that he expected to have the same compensation that others were getting. The manager of the towing company does not deny this statement, but admits that he told the agent that he expected the going rates for such work, and that at his request, and on his guaranty that he should receive $40 per day for its use, he sent for another pump. The going rates, the usual rates, the rates which other wreckers who were performing like services were receiving, were reasonable rates by the day for the tugs, barges, pumps, and other apparatus used, and the testimony which has now been reviewed is convincing that it was only after Capt. Singer had agreed to accept compensation for the services of his company at these rates that he was permitted to enter upon them, and that it was only after he had made a like promise to the agent of the underwriters that he was permitted to continue them. These facts constituted a complete contract on the part of the owners of the vessel and cargo to pay at all events, and on the part of the towing company to receive the usual compensation by the day for its services, and its recovery in this suit should have been reckoned on that basis. In this view an examination of the testimony has been made to ascertain the amount which the towing company should receive for the services it rendered, and the unnecessary damages its barge and apparatus sustained, and our conclusion is that the amount to which it is entitled is $5,245, and interest from December 4, 1898.

The second question presented is: Was the towing company guilty of embezzlement of a part of the cargo, or of such negligence in its care that the claimants may have a deduction of their damages on this account from the amount owing to the towing company for its services? The court below answered this question in the negative. It is certain that a large portion of the cargo was stolen, but a majority of the court is of the opinion that the evidence that the towing company participated in the larceny, or that it was negligent in the care of the property, is not so clear as to warrant a reversal of the finding below upon this issue. Nor is there any finding of the court below, save that upon the issue of the contract for compensation, which is not equally well sustained by the evidence and by the opinion of this court.

The conclusion reached upon the question of the contract regarding compensation renders it unnecessary to consider the errors assigned on the appeal of the towing company, and they will not be further noticed. The result is that the decree below must be reversed; the claimants, C. W. Elphicke and others, must recover their costs in this court; the suit must be remanded to the court below, with directions to enter a decree in favor of the towing company and against the steamship and its cargo, their claimants and sureties, for $5,245, and interest from December 4, 1898, in the same proportions in which the former decree for $10,500 was rendered against them respectively; and that none of the costs in the court below be recovered of any of the parties to the suit.

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(106 Fed. 950.)

DURCHMANN v. DUNN et al.

(Circuit Court of Appeals, Second Circuit. February 27, 1901.)

No. 61.

1. SHIPPING—DEMURRAGE—CONSTRUCTION OF CHARTER.
   A provision in a charter for carrying lumber that the cargo should be furnished "at the port of loading as fast as vessel can receive and properly stow same in suitable hours and weather," has reference to the hours and weather suitable for loading and stowage, and does not exclude time lost by reason of the lumber becoming wet, and unfit for loading, before it is forwarded to the ship.[1]
2. SAME.
   A provision in a charter party that cargo shall be "discharged at port of destination at the average rate of not less than 35,000 superficial feet per running day, Sundays and holidays excepted," refers as to the rate to the discharge at the port of destination, and not to the loading.

Appeal from the District Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decree of the district court, Southern district of New York (101 Fed. 606), giving libelant four days' demurrage—$551.04—for delay in loading the ship Columbus at Batiscan, Canada, in August and September, 1898. The clause of the charter party providing for demurrage reads as follows: "Cargo to be furnished at PORT OF LOADING, *as fast as vessel can receive and properly stow same in suitable hours and weather*, and to be discharged at PORT OF DESTINATION at the average rate of not less than *(35 M) thirty-five* thousand superficial feet per running day, Sundays *and holidays excepted.*" The part in capital letters is so printed in the charter, the part italicized is written.

Hamilton Wallis, for appellants.
Harrington Putnam, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. We concur in the findings and conclusions of the district judge. Inspection of the demurrage clause shows most clearly that the average rate therein stated—"not less than 35,000," etc.—refers to discharge at the port of destination, not to the loading. So, too, it would be a most strained and unwarranted construction to hold that the phrase "in suitable hours and weather" refers to hours or weather elsewhere than at the port of loading, or that it can be availed of to excuse delay occasioned by the circumstance that the lumber got wet (and therefore unfit to ship) through a local rain at the storage yards of the shipper, 12 miles away. The testimony of the master that the payment actually made to him in the port of delivery was the "full amount of the freight money, and nothing else," stands uncontradicted, and precludes any finding that there was an accord and satisfaction. The charter provided for payment of the demurrage day by day by the party of the second part. It was his debt, and was not provided for in the bill of lading. The master, therefore, released no security when he gave up the cargo

[1]Demurrage, see note to Randall v. Sprague, 21 C. C. A. 337.

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to the consignees in Buenos Ayres, and is still entitled to collect his debt from the charterer, even though the latter was but the agent of the consignees, who were the real, although undisclosed, owners. The decree is affirmed, with costs.

(106 Fed. 982.)

THE CITY OF NORWALK.

(Circuit Court of Appeals, Second Circuit. January 22, 1901.)

No. 26.

COLLISION—SAILING YACHT AND PROPELLER—MUTUAL FAULT.

A collision between a sloop yacht and a propeller, crossing in the night at an obtuse angle, *held* to have been due to the fault of both vessels,—of the yacht, in that she failed to have her lights properly screened, by reason of which they crossed and misled the propeller as to her course; and of the propeller, because she failed to take timely precaution to keep out of the way after discovering that the yacht did not keep the course she was at first supposed to be on.

Appeal from the District Court of the United States for the Southern District of New York.

The following is the opinion of the court below (BROWN, District Judge):

"The above libel was filed to recover damages to the sloop yacht Nirvana through collision at about 10 p. m. of August 16, 1897, in Long Island Sound off Greenwich Point with the propeller City of Norwalk. The yacht was about 60 feet long, sailing closehauled on the starboard tack, with the wind westerly and heading about W. S. W., making about six miles an hour. The propeller was bound eastward, heading about N. E. by E. ½ E. Shortly before collision each vessel turned to the southward, so that the propeller at the time of collision headed about E. S. E. and the yacht about S. E. by E., the boats sagging together and the yacht being injured on her starboard side.

"The yacht, when first seen from the propeller, bore 3 or 4 points to port, estimated to be one-half or three-quarters of a mile distant, and according to the testimony for the propeller, both the red and green lights of the yacht were seen. In that situation the propeller would naturally and rightly keep on her course, as she would naturally cross the apparent course of the yacht sometime before the yacht would reach her, and the latter would pass well astern of the propeller. As the boats came nearer together, however, it was observed that the yacht did not fall astern as she would naturally do, but still exhibited both colored lights; and when within 200 or 300 feet of each other, according to the propeller's testimony, the propeller sounded danger signals, and ported and soon backed. When the alarm was sounded the captain testifies that he thought the yacht was keeping off to the southward.

"On behalf of the yacht it is contended that her red light could not have been seen at any time by the propeller because hidden by the fore staysail; that she heard the danger signals of the propeller when the vessels were about 50 or 60 feet apart, and that the yacht then paid off, when collision was unavoidable, in order to ease the blow.

"One of the lights and a screen board of the yacht were exhibited in evidence. The board was constructed wholly different from the requirements. No actual trial was made of the angle to which the light would extend; but from the situation of the light and the short and low screen, I should judge it impossible that the red light should not have crossed and been visible a good deal to starboard of directly ahead, so that both colored lights would be seen though the yacht was not headed for the observer.

"I do not feel warranted, therefore, in discrediting the testimony of the

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master and pilot of the Norwalk, to the effect that they saw both lights for a considerable period before the collision, when from the undoubted situations and courses of the two boats the yacht's red light alone should have been seen. Considering also, that there was a whole sail breeze, and that the fore staysail would naturally belly out a good deal, I ought not to accept the theoretical contention of the yacht that the staysail would necessarily hide the red light, against the positive testimony of the propeller's officers. Accepting their statement on this point, the yacht must be held in fault, because her lights were misleading, and undoubtedly did mislead the officers of the Norwalk for a time in the belief that the yacht's direction was such that she would naturally go well astern of the propeller, without any maneuvering on the propeller's part. The direction of the yacht, however, was at least two points more to the southward than her exhibition of her two colored lights would indicate, and this different actual heading prevented the yacht from falling astern. I cannot hold that this defect in the lights was immaterial. Though the night was clear in a general sense, the evidence on both sides leaves no doubt that it was somewhat hazy upon the water, so that boats could not be well distinguished at a distance. They were not distinguished by either until much nearer than they would have been in a clear atmosphere; and the yacht evidently would not be clearly seen as soon as the propeller.

"Notwithstanding this fault in the yacht in regard to the crossing of her lights, I cannot exempt the propeller, as it is plain from the officers' testimony that they ought to have maneuvered earlier than they did to avoid the yacht, when it became evident that the yacht was not pursuing the course which was at first supposed, but continued on the same bearing instead of falling astern. I do not think it possible, however, that the vessels were so near as the yacht's witnesses state, namely, within 50 or 60 feet, at the time when the propeller gave danger signals. They were then probably from 200 to 300 feet apart, as the propeller's witnesses stated. The changes of course by the two boats before collision strongly confirm this. The yacht changed by paying off from 6 to 7 points up to the time of collision, which she could not have done in going less than 200 feet; the propeller changed from 4 to 5 points, which would have required her to traverse about 300 feet. If the curves of the courses of the two vessels are drawn upon that basis backward from their positions at collision, the two boats at the time they began to change to the southward will be found to be about 300 feet apart. The position of the boats would also be shown by such a sketch to be such that a very little porting would have been required to allow the boats to pass clear of each other, even if they would not have cleared if the yacht had strictly maintained her course. The danger at that moment, however, at a distance of only 300 feet apart each having a speed of 6 or 7 knots, was so imminent that an error at that moment cannot be treated as a legal fault. The fault was in bringing the two boats into such a position; and for doing this both, as I have said, were to blame; the yacht, by reason of her misleading lights, and the Norwalk by her delay of any maneuvers to avoid the yacht, which she was bound to do, for some time after the yacht's course ought to have been perceived to be threatening by her failure to fall astern.

"Decree for the libelants for one-half of the damages and costs."

Le Roy S. Gove, for appellant.

N. D. Lawton, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. Decree affirmed on opinion of court below, with costs.

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(106 Fed. 985.)

THE ARCHIE CROSSMAN and THE GRACIE.

(Circuit Court of Appeals, Second Circuit. March 11, 1901.)

No. 107.

COLLISION—SMOKE—FAILURE TO SIGNAL.

Before daylight a tug came into collision with a boat in tow of a tug in a dense smoke coming from copper works on the shore. The lights of neither tug could be seen by the other until about 50 feet apart. No signals had been given, for the alleged reason that the smoke was not seen until the boats got into it, but the prevalence of such smoke in a north wind, such as was blowing at the time, was a well-known fact to all navigators. The boats were moving at the rate of about five miles an hour. *Held*, that the omission to give timely signals on both sides with the rate of speed was the cause of the collision, rendering both tugs liable.

Appeal from the District Court of the United States for the Southern District of New York.

This was a suit to recover damages for injuries to libelant's tow boat in a collision between the tug and another vessel. This appeal is from a decree holding both vessels in fault.

The opinion filed below, and here reprinted from 106 Fed. 984, was in full as follows:

BROWN, District Judge. Before daylight on the morning of December 3, 1898, as the tug Gracie was coming eastward out of the Kills, she came in collision with the libelant's boat C. & T. Jefferson in tow on the starboard side of the tug Archie Crossman, going in the opposite direction. The collision was in the Kills, a little to the westward of Constable's Hook, and occurred in the dense smoke that came from the copper works on the north side of the Kills, and which in the light wind from the northward spread out thick upon the water. The lights of neither were seen by the other until the two were only from 50 to 75 feet apart. Some signals were immediately given, but as each was going at the rate of 4 or 5 miles an hour these signals were too late to be of any service. The excuse of the Gracie for not giving previous signals is that the smoke was not seen until she got into it. I do not consider this any excuse at all, as the prevalence of the copper works' smoke in a north wind is a well-known fact, and there is no reason, moreover, why it should not have been seen and the proper signals given before entering it. No signals were given by the Crossman other than those immediately before the collision, except at a distance from 500 to 800 feet before she entered the smoke from the east.

The omission on both sides to give a timely signal before getting into this dense smoke with the rate of speed at which they were going, fully explains the collision, without any attempt to resort to any other faults, if there were any; and as both were to blame in this respect, both must be held liable.

The canal boat was sunk and was not worth repairing. The evidence on the trial shows that the value of the boat and furniture lost

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did not exceed $440, after deducting the things that were recovered and the things taken ashore by the libelant's man and lost through his own fault. A decree may be taken against both defendants for $440, with interest from December 4, 1898, unless a reference shall be desired to take further proof as to damages, which may be taken subject to the payment of the costs of the reference unless a more favorable judgment be obtained.

James K. Symmers, for appellants.
James Forrester, for the Gracie.
Peter Alexander, for libelant.

Before LACOMBE and SHIPMAN, Circuit Judges.

PER CURIAM. Affirmed on opinion of district judge.

(106 Fed. 986.)

BOARD OF TRUSTEES OF HARDY TP., HOLMES COUNTY, OHIO, v. BRATTLEBORO SAVINGS BANK.

(Circuit Court of Appeals, Sixth Circuit. February 12, 1901.)

No. 855.

1. TOWNSHIPS—STATUS IN OHIO—CONSTITUTIONALITY OF ACT AUTHORIZING ISSUANCE OF BONDS.
   A township in Ohio is not a corporation, within the meaning of the state constitution; and article 13, § 1, of such constitution, providing that the legislature shall pass no special act conferring corporate powers, does not render invalid an act authorizing a township to issue bonds.
2. MUNICIPAL BONDS—CONSTITUTIONALITY OF ACT AUTHORIZING—BONA FIDE PURCHASER.
   An act of the Ohio legislature, passed in 1893, authorizing a township to issue bonds for the purpose of refunding its then existing indebtedness, was not a law of a general nature, within the meaning of the state constitution (article 2, § 26), providing that all laws of a general nature shall have a uniform operation throughout the state, under the construction previously given such provision by the supreme court of the state; and it cannot be held invalid, as in violation of such constitutional provision, as against a bona fide purchaser of bonds issued by the township thereunder.
3. SAME—DEFENSES AGAINST—ESTOPPEL BY RECITALS.
   An act authorizing the trustees of a township to issue bonds for the purpose of refunding its outstanding indebtedness, which contains no reference to any record of such indebtedness, or requirement that such a record shall be kept, but provides that the bonds shall contain a recital that they are issued under and by authority of such act, must be held to confer power on the trustees, who are the officers charged with the duty of incurring the indebtedness of the township, to recite in the bonds that the valid indebtedness of the township is such as to authorize their issuance under the act, in order to refund it; and such recital is conclusive on the township, in favor of a bona fide purchaser of the bonds.

In Error to the Circuit Court of the United States for the Northern District of Ohio.

This was an action to recover the amount of a township bond and certain interest coupons. From a judgment for plaintiff, defendant brings error.

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The statement and opinion filed below, and here reprinted from 98 Fed. 524, were in full as follows:

This is a suit at law brought by the Brattleboro Savings Bank against the board of trustees of Hardy township, Holmes county, Ohio, to recover the amount due on one bond of said township, of an issue of 20 bonds, for $1,000 each, together with 40 interest coupons, —two from each of the 20 bonds,—which are averred to be due and unpaid. The bonds are in the form following:

"United States of America, State of Ohio, Holmes County, Hardy Township.

"No. ———. Refunding Bond. 1,000 Dollars.

"Know all men by these presents, that the township of Hardy, in Holmes county, state of Ohio, is indebted to and promises to pay the bearer the sum of one thousand dollars, in lawful money of the United States of America, at the township treasurer's office of said Hardy township, Millersburg, Ohio, on the first day of July, A. D. 1——, with interest thereon at the rate of six per cent. per annum, payable semiannually on the first day of January and July of each year, upon the presentation and delivery of the proper coupon hereunto annexed, signed by the township clerk, at the township treasurer's office of said Hardy township, Millersburg, Ohio, for the payment of which sum and interest the said township is hereby held and firmly bound; and its faith and credit and all the real and personal property in said township is hereby pledged for the prompt payment of this bond and interest at maturity. This bond is one of a series of bonds of like date, tenor, and effect, issued for the purpose of procuring the necessary means to refund and pay the present existing and outstanding indebtedness of said township. This bond is issued and executed under and by authority of, and in accordance with, the provisions of an act of the general assembly of the state of Ohio passed on the first day of February, A. D. 1893. And it is hereby certified and recited that all acts, conditions, and things required to be done precedent to and in the issuing of said bonds have been properly done, happened, and performed, in regular and due form as required by law, and that the indebtedness which is refunded by this series of bonds does not exceed in amount the actual amount of outstanding indebtedness, and is a valid, subsisting, and legal obligation of said township, and that neither the indebtedness so refunded nor this series of bonds exceed the statutory or constitutional limitation. In testimony whereof, we, the undersigned officers of Hardy township, Holmes county, state of Ohio, being duly authorized to execute this obligation on its behalf, have hereunto set our official signatures this 4th day of February, A. D. 1893.

John Fitch,
"John P. Larimer,
"Samuel Devore,
"Trustees of Hardy Township.

"G. U. Duer, Township Clerk."

The act under which the bonds purport to be authorized is entitled, "An act to authorize the trustees of Hardy township, in Holmes county, Ohio, to issue and sell the bonds of said township for the purpose of paying off and satisfying the present existing outstanding indebtedness of said township." It was passed February 1, 1893, and is found in 90 Ohio Laws (Local Laws) p. 291, and is as follows:

"Section 1. Be it enacted by the general assembly of the state of Ohio, that the township trustees of Hardy township, Holmes county, Ohio, are hereby authorized and empowered to issue the bonds of said township for the purpose of paying off and satisfying all, or any portion of the present, existing, outstanding indebtedness of said township. If it shall appear to the said board of trustees to be for the best interest of said township, they shall have the power and are hereby authorized to sell at not less than their par value at public or private sale, the negotiable bonds of said township at a rate of interest not to exceed six per cent. per annum, interest payable semi-annually, provided, however, that the amount of bonds issued and sold shall not exceed the amount of the present existing, outstanding indebtedness.

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"Sec. 2. Said bonds shall be of denominations of $1,000 each, shall be numbered consecutively commencing with number 1, shall contain the recital that they are issued under and by authority of this act. The bonds shall be designated as refunding bonds and shall be signed by the trustees of said township and countersigned by the township clerk; one $1,000 bond shall become due and payable on the first day of July, 1898, and one bond of $1,000 on the first day of July of each and every year thereafter until all of the said bonds are paid. Both principal and interest of said bonds shall be payable at the township treasurer's office in said Hardy township. After said bonds have been sold, the proceeds shall be applied to the payment of the said existing outstanding indebtedness of said township, and for no other purpose.

"Sec. 3. Said bonds shall have interest coupons attached evidencing the several instalments of interest as they become due, which coupons shall be signed by the clerk of said township. Said township trustees are hereby authorized and empowered to levy, annually, a tax on all the taxable property in said township, sufficient to pay both principal and interest of said bonds, as they severally become due.

"Sec. 4. This act shall take effect and be in force from and after its passage."

A jury was waived, and the cause submitted to the court.

It is agreed that the bonds were duly executed and signed in accordance with the provisions of the statute by the officers purporting to sign them, and that the plaintiff bank purchased the entire issue of the bonds, through Spitzer & Co., brokers, of Boston; that the interest on the bonds was paid from the date of their issue to July, 1897; that the plaintiff had no knowledge whatever of any defect in the issue of the bonds, or that the valid indebtedness of the township, existing at the time of their issue, exceeded the amount of the bonds. The defendant offered evidence to show that the only indebtedness of Hardy township which these bonds were issued to meet arose under the act of April 6, 1892, entitled "An act to authorize Hardy township, Holmes county, to issue and sell bonds of said township, for the purpose of aiding and encouraging public improvements, to an amount not exceeding $40,000" (89 Ohio Laws, p. 597); that this act contemplated the use of the proceeds of the bonds to encourage the construction of railroads and mechanical establishments in the village of Millersburg, in said township, and the appointment of 15 trustees to superintend the expenditure of the fund thus raised; that the act contemplated a vote of the people; that the vote was had; that the bonds were issued; that there was no indebtedness whatsoever except these outstanding railroad improvement bonds thus issued under the act of 1892, as would appear by the records of the township; that the money from these bonds went to the township treasurer, and thence to the trustees for the public improvement under the act of 1892, and that the trustees of the township received and expended no part of it; that, in the contract for the sale of the first bonds under the act of 1892, there was a stipulation that the purchaser should receive for the bonds thereby about to be issued refunding bonds; and that this contract for refunding bonds was spread on the records of the township. Under this offer the evidence was held to be incompetent, in the absence of further evidence showing that the plaintiff had actual notice of the facts offered to be proved.

TAFT, Circuit Judge (after stating the facts as above). The first question which arises is whether the act of 1893, above recited, is valid; for, of course, if the act under which the bonds purport to be issued is without constitutional authority, then it could confer no power to issue the bonds here in suit. Two objections are made to the validity of the act:

1. It is said that it is in violation of section 1, art. 13, of the constitution of Ohio, providing that the general assembly shall pass no special act conferring corporate powers. It was at first contended that this imposed only a limitation upon the right to pass laws of incorporation, and did not limit the power of the

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legislature of conferring additional faculties upon a corporation already created. But it is now settled that an act confers corporate powers which either creates a corporation or adds to the powers of a corporation already existing. Atkinson v. Railroad Co., 15 Ohio St. 21, and State v. City of Cincinnati, 20 Ohio St. 18, 36. If the trustees of Hardy township are a corporation, within the meaning of this section of the constitution, then the act giving them the power to issue bonds for refunding purposes is certainly a corporate power. It appears that for certain purposes the trustees of a township in Ohio are created a body corporate. Section 1376. Thus, it is argued that the power conferred upon them must be a corporate power. The contention must fail, however, upon clearly-settled authority. The section of the constitution in question applies only to powers conferred upon private corporations and powers conferred upon public municipal corporations. The constitution recognizes both of these classes of corporations as such. It treats as entities, or quasi entities, of a different character, counties, townships, and school districts; and even though the legislature sees fit by statute to create these so-called quasi corporations, which are mere instrumentalities or branches of the state government for local purposes, into corporations by name, it does not thereby bring them within the inhibition of the section under consideration, which applies only to such corporations as were covered in the constitution under that name. It is settled in Ohio that neither the township nor its trustees are invested by section 1376 with the general powers of a corporation. Trustees v. Miner, 26 Ohio St. 452, 456. In State v. Powers, 38 Ohio St. 54, the question was whether an act which conferred upon a particular school district in the township of New London, in Huron county, Ohio, certain powers, was a special act conferring corporate power, within the inhibition of the constitution. Judge McIlvaine, in delivering the opinion of the court, said:

"Whether powers conferred by the legislature upon a common-school district be corporate or not, within the meaning of the provisions of the constitution, cannot be determined definitively by the mere fact that such district or its board of education is declared by statute to be a corporation, but rather by the object of its creation and the nature of its functions. The district is organized as a mere agency of the state in maintaining its public schools, and all its functions are of a public nature. The evils which this provision was intended to prevent are not found in the special privileges conferred upon such public agencies. The evils sought to be prevented were such as resulted from special privileges conferred upon private corporations. That the inhibition extends to municipal corporations, cities, and villages, has been settled by adjudications. See State v. City of Cincinnati, 20 Ohio St. 18, and 23 Ohio St. 445; State v. Mitchell, 31 Ohio St. 592, and cases there cited. In reference to these decisions, it is proper to remark that many of the powers and franchises of municipal corporations are of a private and local character, essentially different from those of mere political subdivisions of the state, commonly called 'quasi corporations.' And, again, cities and villages are classified as corporations, and provided for in article 13 of the constitution, which relates solely to corporations, section 6 of which provides for their organization by general laws; so that the decisions referred to, in which the inhibition of the 1st section is held to apply to municipal corporations, are of no weight on the proposition that school districts or other political subdivisions of the state are subject to the same inhibition. On the other hand, school districts are constituted so as to partake rather of the character of counties and townships, which are provided for in the tenth article of the constitution, not as corporations, but as

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mere subdivisions of the state for political purposes, as mere agencies of the state in the administration of public laws. Hunter v. Commissioners, 10 Ohio St. 515; State v. City of Cincinnati, 20 Ohio St. 18. In this article reference is made to 'similar boards' in connection with the commissioners of counties and trustees of townships. It is quite obvious to us that county and township organizations, although quasi corporations, are not within the meaning of this provision of the constitution; and, upon full consideration, we are unanimous in the opinion that school districts, as similar organizations, though declared by statute to be bodies politic and corporate, are not within the reason or meaning of this inhibition of the constitution. Beach v. Leahy, 11 Kan. 23, a case exactly in point."

The case cited by the supreme court, with approval, from 11 Kan., involved the validity of an act authorizing school district No. 2, Neosho county, Kan., to issue bonds to build a school house. The constitution of Kansas contained a clause exactly like the one under consideration, forbidding the legislature to pass "any special act conferring corporate powers." By statute the legislature of Kansas had provided that every school district organized in pursuance of the act should be a body corporate, and should possess the usual powers of a corporation for public purposes. It was held by the supreme court of Kansas (Mr. Justice Brewer delivering the opinion) that school districts, though created into corporations by the legislature, were not corporations within the meaning of the constitution, and that power conferred upon them by the special act was not thereby inhibited. See, also, Hunter v. Commissioners, 10 Ohio St. 515; State v. City of Cincinnati, 20 Ohio St. 18, 37; Finch v. Board, 30 Ohio St. 37.

The opinion of Judge Scribner in delivering the opinion of the circuit court of Huron county in the case of Eckstein v. Board, 10 Ohio Cir. Ct. R. 480, 490, expressing the view that an act conferring upon the authorities of the Chicago Junction village school district power to borrow money and issue bonds is a special act conferring corporate power, within the Ohio constitution, cannot, in view of the cases already cited, be regarded as an authoritative exposition of this constitutional limitation. It seems to be held by the court, through the learned judge, that the power to issue bonds and borrow money is a corporate power, upon whomsoever it may be conferred, and therefore that, if conferred upon a school district, it is within the constitutional restriction. In this view I cannot concur. There is no reason why a natural person may not issue bonds and secure them by mortgage. The power thus exercised is not corporate, therefore, except when it is conferred upon a corporation; and it is not corporate, within the Ohio constitution, except when it is conferred upon a corporation such as that instrument contemplated in the inhibition. The point to which the case is cited was clearly in judgment by the court, but it was a question ancillary to the main question considered in the opinion, and did not, evidently, have the careful consideration which the main question had.

2. A more serious objection to the validity of this act is based upon article 2, § 26, of the Ohio constitution, providing that all laws of a general nature shall have a uniform operation throughout the state. In the case of Cass v. Dillon, 2 Ohio St. 607, it was

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held that an act of the general assembly, passed on March 24, 1851, to authorize the county of Muskingum to subscribe to the capital stock of the Cincinnati, Wilmington & Zanesville Railroad Company, upon the condition that such subscription should be first approved by a majority of the qualified electors of the county, to be ascertained at an election held upon notice for that purpose, was not an act which, having been passed by the legislature prior to the going into effect of the constitution of 1851, was repealed by section 1 of the schedule, providing that all laws in force on the 1st day of September, 1851, not inconsistent with this constitution, should continue in force until amended or repealed. It was held expressly in this case that such a law was not inconsistent with article 2, § 26, providing that all laws of a general nature shall have a uniform operation throughout the state. Judge Thurman, delivering the majority opinion of the court, said:

"We are also referred to section 26 of article 2, which provides that 'all laws of a general nature shall have a uniform operation throughout the state; nor shall any act, except such as relates to public schools, be passed, to take effect upon the approval of any other authority than the general assembly, except as otherwise provided in this constitution.' That the first branch of this section has had the effect to abolish certain laws of a general nature, whose operation was confined to particular localities, I have not the least doubt; but the act under consideration is not a law of that character. That it is a public law, of which the courts ex officio take notice, may well be admitted; but it does not follow that it is of a general nature. It is no more of a general nature than would be an act to authorize the construction of a bridge or the erection of a poor house. As well might it be said that the act authorizing Hamilton county to build a jail (49 Ohio Laws, p. 130) was of a general nature, and therefore repealed. All such acts are, of necessity, local in their character. The origin of this section is perfectly well known. The legislature had often made it a crime to do in one county, or even township, what it was perfectly lawful to do elsewhere, and had provided that acts, even for the punishment of offenses, should be in force, or not, in certain localities, as the electors thereof respectively might decide. It was to remedy this evil and prevent its recurrence that this section was framed. How far it reaches, it is not now necessary to decide. That it may be difficult sometimes to say whether an act is within the meaning, or not, is very probable. But certainly it cannot be doubted that where, in the nature of things, the character of an act is necessarily local, the first branch of the section has no application."

Cass v. Dillon was followed in a number of cases thereafter presenting substantially the same question.

In State v. Trustees, 8 Ohio St. 394, the question was whether an act conferring authority on the trustees of Union township, Fayette county, to subscribe for stock in a railroad company, and to issue bonds, was invalid, as being inconsistent with the constitution of 1851, though passed before the going into effect of the constitution; and the act was sustained. In State v. Judges, 21 Ohio St. 1, it is held that an act limiting the compensation of certain officers therein named, intended to apply to Hamilton county only, was not a law of a general nature, but of a local nature, and therefore not in conflict with the section under consideration. In State v. Covington, 29 Ohio St. 102, it was held that an act to regulate the police force in cities of the first class was not a law of a general nature, which should have uniform operation throughout the state. In McGill v. State, 34 Ohio St. 228, the act of May 7, 1877, regulat-

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ing the selection of jurors in the county of Cuyahoga, was held not to be a law of a general nature, within the meaning of this section. In State v. Hoffman, 35 Ohio St. 435, an act providing for the relief of W. M. Corry from an assessment under public improvement in the city of Cincinnati, in Hamilton county, is held to be an act of local and temporary nature, and that the relief was not of the character which should necessarily be granted by general law. In State v. Commissioners, 35 Ohio St. 458, it is held that an act providing for the improvement of a certain designated county road was local in its nature, and not in conflict with this section. In State v. Board, 38 Ohio St. 3, it is held that an act requiring the board of education of a city to release the sureties of a county treasurer from liability for school funds of the board which came to the hands of the treasurer for disbursement was not a general act. In State v. Powers, 38 Ohio St. 54, an act to consolidate the territory comprising the township of New London, Huron county, into a special school district, was held to be in conflict with the section in question, on the ground that the public schools in the state of Ohio, and their conduct and management, were matters of a general nature. The case of State v. Powers, in this regard, was expressly overruled in the case of State v. Shearer, 46 Ohio St. 275, 20 N. E. 335, in which it was held that the subject of dividing territory into school districts is in its nature local, and hence the formation of a special school district from territory within the limits of a township, by special act, was not in conflict with section 26, art. 2, of the constitution. The first paragraph of the syllabus in the Shearer Case, which, in Ohio, states the law of the case, is as follows:

"(1) A law is not necessarily of a general nature by reason simply of its being upon a general subject. (2) Special legislation upon a subject-matter in its nature local is not prohibited by section 26 of article 2 of the constitution, notwithstanding the subject-matter is the subject of a general law."

The case of State v. Shearer was cited approvingly in the case of Metcalf v. State, 49 Ohio St. 586, 31 N. E. 1076.

In Hart v. Murray, 48 Ohio St. 605, 29 N. E. 576, it was held that an act providing for compensation for justices of the peace in certain cities of the second grade of the first class in the state, in lieu of fees, was not a law of a general nature, but was local in its character, and did not come within the constitutional inhibition. In State v. Kendle (decided in 1895) 52 Ohio St. 346, 39 N. E. 947, it was held that the act of the general assembly requiring common pleas judges in the several subdivisions of the common pleas districts of the state to appoint jury commissioners was not in conflict with the section under consideration, although it did not operate in six counties of the state. On the other hand, it has been held, under the same section, in Ex parte Falk, 42 Ohio St. 638, that a statute providing punishment for an act which is malum in se wherever committed, being a law of a general nature, cannot be made local on the ground that the inhibited act is of greater evil in a large city than in other parts of the state. In State v. Winch, 45 Ohio St. 663, 18 N. E. 380, it was held that an act passed April 12, 1876, to prevent gambling and the selling of intoxicating liquors on or within a certain dis-

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tance of Chippewa Lake, in the county of Medina, was a law of a general nature, and invalid. In State v. Ellet, 47 Ohio St. 90, 23 N. E. 931, it was held that an act to require the county commissioners of a certain county to provide a depository for the county funds was a law of a general nature, for the reason that the funds there deposited were part of the state funds, and concerned the people of the state. In Commissioners v. Rosche, 50 Ohio St. 103, 33 N. E. 408, it is held that an act to provide for refunding of taxes erroneously paid under section 2742 of the Revised Statutes in counties containing a city of the first grade of the first class was legislation of a general character, not having uniform operation, because there could be no reason why a taxpayer of Hamilton county should have any more speedy remedy for the recovery of illegally paid taxes than the taxpayer of any other county of the state.

These cases show the condition of the law down to the time when the bonds in the present case were issued and paid for. It seems to me that a consideration of this act shows clearly that its object was of a local and temporary nature. At this time townships were not authorized by general law to refund their indebtedness. It might very well be (and we must assume in support of the law that it was the case) that the indebtedness of this township was of such a character that it could not be paid off readily by taxation, and needed to be refunded in long-time obligations. The law does not apply to the future indebtedness of the township, but only to that which was in existence at the time of the passage of the act. Now, while it is true that the refunding of township indebtedness may be provided for by general laws, this, under the decisions already quoted, and especially that in State v. Shearer, 46 Ohio St. 275, 20 N. E. 335, is not a reason for holding that the subject-matter of the special law is necessarily general. In accordance with these decisions, it seems to me clear that at the time these bonds were issued the result of judicial construction of the constitution was that particular township indebtedness, as well as particular county indebtedness, might be provided for by special act. Any other view cannot be reconciled with Cass v. Dillon, 2 Ohio St. 607, and State v. Trustees, 8 Ohio St. 394. It is true that in two decisions some years subsequent to the issuing of these bonds, to wit, in Hixson v. Burson, 54 Ohio St. 470, 43 N. E. 1000, and State v. Davis, 55 Ohio St. 15, 44 N. E. 511, the operation of section 26, art. 2, of the constitution, has been given a much broader effect, and the subject-matter of an act authorizing a particular county to build a county road, and a particular county to build a county bridge, and issue bonds therefor, has been declared to be of a general nature, and so invalid, because not having uniform operation. These decisions, however, expressly overrule the decision of the supreme court in State v. Commissioners, 35 Ohio St. 458, and are undoubtedly to be regarded as a change in the judicial construction of this section by the highest court of the state. I do not think it necessary to consider the question whether, even under these decisions, the legislation under discussion might not still be regarded as of a local nature, though the fact that the power might be conferred by a general act would seem, under

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those decisions, to render the special act conferring it invalid. It is quite sufficient to hold, in favor of a bona fide purchaser for value, that, under the judicial construction of the constitution in force at the time the bonds were issued, this act was not to be regarded as an act of a general nature, and was not, therefore, invalid. This principle is so well established that a reference need only be made, without discussion, to the cases. See Douglass v. Pike Co., 101 U. S. 677, 25 L. Ed. 968; Loeb v. Trustees (C. C.) 91 Fed. 37.

3. Reliance is had upon section 7 of article 10, whereby it is provided that the commissioners of counties, trustees of townships, and similar boards, shall have such power of local taxation for police purposes as may be prescribed by law. It is said that this limits the power of the trustees of townships to incur any indebtedness except for police purposes, because it is implied that the township cannot contract debts except for purposes for which it may levy a tax. This contention cannot be reconciled with the language of Judge Thurman in the case of Cass v. Dillon, 2 Ohio St. 607, 622, already referred to. But it is immaterial, in this case, whether the township has power to contract debts for other than police purposes, because there was nothing on the face of the bonds to show that the existing indebtedness was contracted for anything but police purposes.

The act under which the bonds were issued being valid, for the purposes of this suit by the plaintiff, the question next arises whether, in the face of the recitals of the bonds, the defendant is entitled to show that there was no valid existing indebtedness at the time the bonds were issued, and that the real purpose of issuing the bonds was to obtain money with which to comply with another act of the legislature authorizing the township to issue bonds for railroad purposes,—a purpose plainly in violation of the constitution of Ohio. The act contains no express provision as to who shall determine what was the amount of the present existing, outstanding indebtedness. The bonds, however, were to be issued by the trustees of the township. They were the officers of the township properly charged with the duty of incurring the indebtedness of the township, and therefore with the duty of determining, primarily at least, what was its valid indebtedness, in fixing the tax rate for its payment. There is no provision in the act referring to a public record of the indebtedness, and no requirement that such a record should be kept in the act itself. The second section does contain a provision that the bonds shall contain a recital that they are issued under and by authority of this act. It seems to me clear that this provision intends to confer upon the trustees of the township, in issuing the bonds, power to make a recital which shall show that the bonds have been duly issued under the act, and therefore that the limit of indebtedness prescribed by the act has not been exceeded in their issue. In other words, the act confers, by implication, upon the township trustees, the power to recite the fact which they do recite in the bond, to wit, that the valid outstanding indebtedness of the township is such as to justify the issue of the bonds in order to refund it. The case therefore comes clearly within the decision of the supreme court of the United States in Commissioners v. Rollins, 173 U. S. 255, 19 Sup. Ct. 390, 43 L. Ed.

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689; and not within the cases of Chaffee Co. v. Potter, 142 U. S. 355, 12 Sup. Ct. 216, 35 L. Ed. 1040; Dixon Co. v. Field, 111 U. S. 83, 4 Sup. Ct. 315, 28 L. Ed. 360; and Lake Co. v. Graham, 130 U. S. 674, 9 Sup. Ct. 654, 32 L. Ed. 1065. It comes, also, within the case of City of Cadillac v. Woonsocket Institution for Savings, by the circuit court of appeals for this circuit (7 C. C. A. 574, 58 Fed. 935), and within the case of City of Huron v. Second Ward Sav. Bank, 30 C. C. A. 38, 86 Fed. 272, and the cases there cited.

It is plain that it was not the legislative intention to refer the purchasers of these bonds to the records of the township, from which it might be possible to make out the liabilities of the township accruing from time to time; but it was intended by the recital on the face of the bonds to save the purchaser from this necessity, and to justify him in relying upon the honesty of those recitals, which were to be made, it may be observed, by the same officers of the township who, under the law, would contract that indebtedness, and must provide for its payment.

These views lead me to the conclusion that the plaintiff is, in this case, entitled to a judgment for the full amount of the bonds and coupons sued upon, with interest, as claimed in the petition.

S. B. Bailey, for plaintiff in error.

Wm. H. Harris, for defendant in error.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

PER CURIAM. For the reasons stated in the opinion of the judge in deciding this case at the circuit, the judgment is affirmed.

(106 Fed. 987.)

FARRELL v. CONTINENTAL IRON WORKS.

(Circuit Court of Appeals, Second Circuit. March 12, 1901.)

No. 123.

NEGLIGENCE—ACTION FOR PERSONAL INJURY—SUFFICIENCY OF EVIDENCE.

Libelant contracted to carry a cargo of coal on his canal boat, and deliver the same to respondent, as consignee, and to tend the guy while the cargo was being discharged by respondent. While holding the guy rope in the performance of such duty, it came untied from the chain to which it was fastened, and in consequence libelant fell and was injured. The rope had been tied in the morning by an employé of respondent, but the knot was examined by libelant, who was competent to judge of its sufficiency, and he testified that it was sufficient and could not have come untied. *Held*, that he assumed the risk of its sufficiency, and could not recover on the ground of the negligence of respondent's servants; the preponderance of evidence showing that none of such servants had disturbed the knot since it was first tied.

Appeal from the District Court of the United States for the Eastern District of New York.

Suit to recover for personal injury on the ground of negligence. Libelant appeals from a decree dismissing the libel.

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The opinion filed below, and here reprinted from 102 Fed. 514, was in full as follows:

THOMAS, District Judge. The libelant, who was the owner and captain of the canal boat Lizzie Farrell, entered into a contract with Coxe Bros. & Co., whereby the libelant agreed to carry on his boat certain coal from Perth Amboy, N. J., and deliver the same to the Continental Iron Works, the respondent, and receive therefor the sum of 20 cents per ton alongside; and the libelant also agreed to tend the guy during the discharge of the boat. For the purpose of tending the guy, the libelant stood on one side of his vessel and held a rope, which from his hands ran to and fastened to the chain connecting the bucket with the fall. Some person, who seems to have been connected with the drawing away of the coal, tied the guy rope to the ring in the chain, in the presence of the libelant, and the latter tended the guy rope thus fastened from about 7 in the morning until 12 noon. After an interval of an hour he resumed his work, and continued until about half past 3 o'clock, at which time the end of the rope fastened through the ring became untied, causing the libelant to lose his balance and fall back upon a load of coal in a canal boat behind him, and receive the injuries which are the subject of the present action.

In whatever legal relation the libelant stood to the respondent, the same degree of care was required of the latter, and the question is whether such care was exercised. The libelant testifies that before starting work in the morning he noticed how the guy rope was fastened; that there were 12 or 14 inches hanging over on the short end, and that, as long as it was fastened as he found it in the morning, it was impossible for it to become untied; that the reason he did not notice it in the afternoon was because he thought it was the same fastening as in the morning. The evidence of the libelant is explicit that he knew what the tie was in the morning, and that it was sufficient. Therefore, by whosesoever hand it was made, it must be concluded that the respondent, or somebody acting in its behalf, had exercised the reasonable care required to secure the safety of the libelant, so far as the manner of fastening the guy rope was concerned. The result shows that the tie was not secure, but the libelant had opportunity to see, and did see. He had the knowledge of an expert, which capacitated him to pass upon the sufficiency of the knot, and he did pass judgment upon it. The respondent was not an insurer, nor bound to the highest care in adjusting the knot, and the judgment of the libelant is conclusive evidence that the respondent used the care imposed upon it. If there was risk, the libelant had an opportunity to know what it was, and, whatever it was, he assumed it. But the libelant urges that the fastening of the morning was not the fastening of the afternoon. He states that he thought it was the same. Therefore to his eye there had been no change. It appears that at the noon hour the fall was changed, by the rope of which it consisted being renewed in whole or in part. But, whatever was done, it was not necessary to untie the guy rope. Nor is it apparent what useful purpose would have been effected by untying it. But

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the several persons connected with the replacing or repairing of the fall stated that the guy rope was not interfered with, so far as they severally knew. But a witness produced by the libelant states that he saw a certain servant of the respondent tie the guy rope on before the beginning of the work in the afternoon after the replacing of the fall, and that two other persons named were then present. That servant and such person, being produced, said that the servant did not tie the guy at such time, but that he did tie it after it gave way in the afternoon, and after the libelant was hurt. The force of the evidence against the libelant is at least as strong, and, it is thought, stronger than that in his favor, in this regard; and the conclusion must be reached that the guy rope was tied only in the morning, and that such tie was satisfactory to the libelant, who is himself expert in such matters. The burden of proof is upon the libelant, inasmuch as the mere untying of the rope after several hours of use would not of itself raise a presumption of negligence. It is true that the libelant states that the tie in the morning could not become loosed, and that therefore the guy rope must have been taken off at the noon hour. That is the libelant's opinion, and should be held of considerable value, but it cannot outweigh the fact which the preponderance of evidence establishes. The libel should be dismissed, with costs.

Martin A. Ryan, for appellant.
Jesse W. Johnson, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. Decree of district court affirmed.

(106 Fed. 987.)

In re HERRMAN.

(Circuit Court of Appeals, Second Circuit. February 7, 1901.)

No. 83.

1. BANKRUPTCY—DISCHARGE—APPLICATION UNDER THE ACT OF 1867—EFFECT ON APPLICATION UNDER ACT OF 1898.
   An order refusing to discharge a bankrupt under the bankruptcy act of 1867 does not estop the bankrupt from applying for a discharge upon the same facts, and as to the same debt, under the act of 1898.

2. SAME—PLEA IN BAR.
   The pendency of an application for the discharge of a bankrupt under the bankruptcy act of 1867 cannot be pleaded in bar of an application by the debtor for a discharge under the act of 1898.

3. SAME.
   Debts existing under the bankruptcy act of 1867, and kept alive by subsequent judgment, are not excepted from the operation of the act of 1898.

Petition to review order of the district court of the United States for the Southern district of New York, denying motion for leave to amend a specification of certain creditors in opposition to a discharge in bankruptcy, so as to show pendency of proceedings

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under act of 1867, and an application for a discharge therein which is still pending and undetermined.

The opinion filed below, and here reprinted from 102 Fed. 753, was in full as follows:

BROWN, District Judge. A motion is made for leave to amend the fourth specification of certain creditors in opposition to the bankrupt's discharge, by alleging the pendency of former proceedings in bankruptcy under the act of 1867 and of an application for a discharge therein which is still pending and undetermined. That specification, as it stands, states that the discharge of the bankrupt was refused in the former proceeding. Investigation shows that no order to that effect has ever been entered. The moving creditors have a claim which was proved in the former proceedings and which has been kept alive by a judgment obtained thereon in 1898. The present motion is based upon the theory that the refusal of a discharge in the former proceeding would be res judicata as respects the same debt in the present proceeding; and that the pendency of the old application for a discharge would be good as a plea in abatement, as of a former suit pending; and that the discharge of the old debt can only be sought or obtained in the old proceeding. On consideration, I am unable to sustain this view.

Proceedings in bankruptcy are doubtless in the nature of a suit (Sandusky v. Bank, 23 Wall. 289, 23 L. Ed. 155; In re Adams, 36 How. Prac. 270, 271, Fed. Cas. No. 40; In re Comstock, 3 Sawy. 128, Fed. Cas. No. 3,077), and no doubt the refusal of a discharge under the act of 1867 would be res judicata upon any subsequent application for a discharge under that act as respects the same debt; and similarly, while a former proceeding is pending, no subsequent application for a discharge from the same debts would be entertained under the same act. But these rules in my judgment have no application to proceedings for a discharge under wholly independent and widely separated statutes of bankruptcy, like those of 1867 and of 1898. The provisions regulating discharges are quite different in the two statutes; so that though a discharge were refused under the act of 1867, the bankrupt upon the same facts might be entitled to a discharge under the act of 1898.

The facts stated in the moving affidavits and the records of this court furnish a strong presumption that the proceedings for a discharge under the former act were virtually abandoned in 1879, as the bankrupt was not likely to succeed in obtaining it. There were then numerous specifications in opposition to his discharge, two of which were the same as are raised in the present proceeding, and which would bar a discharge under the present act if proved. The former proceeding, which has never been determined by the entry of any order refusing a discharge, can have no greater force as a bar to the present proceeding, however, than if an order of refusal had been in fact entered. But even if such an order had been entered, and even if the refusal was solely upon grounds which would bar a discharge under the present act, the debtor would in my judgment still be at liberty to proceed for a discharge under the act of 1898 without reference to the act of 1867, or any proceeding under it; and his right to

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a discharge now must be determined by the provisions of the present act alone.

The only effect of a refusal of a discharge under the old act was to exclude the debtor from all relief under that act, and to leave his debts existing as before. The act of 1898, passed 20 years after the repeal of the act of 1867, marks a new beginning. It is wholly independent of the former act. It was designed to give to debtors a fresh start in life, freed from the weight of all former debts, except such as are expressly excluded from the operation of the present act. Old debts existing under the former act and kept alive until now by subsequent judgments, are not excepted from the new act, though a discharge from them under the former act was denied. They are, therefore, presumably within the intent of the present statute. The long disability of the debtor under the pressure of his old debts is in effect made by the present act a sufficient punishment for the offenses which previously barred his discharge. The new act as respects discharges supersedes the old, and its design to give freedom to all debtors upon an honest compliance with its provisions, subject only to its own restrictions, would be clearly thwarted pro tanto, if relief under it were refused merely because similar relief had been refused under the act of 1867.

Upon this view of the intent of the present act, it follows that the facts desired to be set up in opposition to the discharge, are immaterial, and would constitute no bar to a discharge; and on that ground the motion is denied.

S. L. Samuels, for petitioners.
F. C. Reed, for bankrupt.

Before LACOMBE and SHIPMAN, Circuit Judges.

PER CURIAM. Order affirmed on opinion of district judge.

(106 Fed. 988.)

LAMSON CONSOL. STORE-SERVICE CO. v. CHAMBERLIN.

(Circuit Court of Appeals, Second Circuit. February 27, 1901.)

No. 77.

PATENTS—ANTICIPATION—STORE-SERVICE APPARATUS.

The Goodfellow patent, No. 493,621, for a store-service apparatus, claims 1, 2, 3, 5, and 13, covering the method of propelling a carrier along a way or track by means of a flexible cord or device running along the track under the upper wheels of the carrier and over pulleys above, or over the under wheels of the carrier and under pulleys below at each end, which by being pulled over the pulleys separates itself from the way, causing the carrier to move from one end of the way to the other, were not anticipated, and are valid.

Appeal from the Circuit Court of the United States for the District of Vermont.

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This was a suit for infringement of a patent. From a decree for plaintiff, defendant appeals.

The opinion filed below, and here reprinted from 103 Fed. 311, was in full as follows:

WHEELER, District Judge. This suit is brought upon patent No. 493,621, applied for June 4, 1885, dated March 14, 1893, and granted to John H. Goodfellow, assignor by mesne assignments to the plaintiff, for a store-service apparatus for conveying packages between the clerks' station and the cashier's desk on wheeled carriers, suspended on a track or way, and propelled by a flexible cord or device running along and from the track under the upper wheels of the carrier and over pulleys above, or over the under wheels of the carrier and over pulleys below, at each end, which, by being pulled over the pulleys pressing against and along the face of the wheels, separates itself from the way, and moves the wheels forward, carrying the body of the conveyor either way, from end to end. The specification describes a two-part elongated wedge at the ends of the way for stopping and retaining the carrier, and says:

"The way may be inclined, the propeller acting to force the carrier up the same until it is arrested by the wedge or stop; the carrier being returned partly by the action of the propeller at that end, and partly by gravity."

There are 14 claims. Those alleged to have been infringed by the defendant are:

"(1) The combination, in a store-service apparatus, with a way, and a wheeled carrier movable upon the way, of a flexible line extending along the way, and adapted to engage with the carrier and propel it along the way by the progressive separation of the flexible line from the way, substantially as set forth. (2) The combination, in a store-service apparatus, with a way and a wheeled carrier movable upon the way, of a bendable propeller adapted to engage with the carrier and propel it along the way by the progressive separation of the propeller and the way, which carrier resists such separation during such action, substantially as set forth. (3) The combination, in a store-service apparatus, of a wheeled carrier, a way, and a propeller leading between the wheels of the carrier, said propeller adapted to engage with carrier and propel it along the way by the progressive separation of the propeller and way, substantially as set forth." "(5) The combination, in a store-service apparatus, of a way, a wheeled carrier adapted to travel from end to end on said way, a stop for holding the carrier in the position at which it is arrested, and a propeller extending along the way, and adapted to engage with the carrier and propel it along the way by the progressive separation of the propeller from the way, substantially as set forth." "(13) The combination of the way, a propelling cord or line secured at one end of the way, and movable at the opposite end from the way, and a carrier provided with two sets of wheels, one above and the other below the way, substantially as and for the purpose set forth."

English patent No. 737 was granted to Frederick Octavius Palmer, March 10, 1869, for an apparatus for carrying goods or passengers from one place to another, and especially across rivers and glens, consisting of a car hung to the axis of a pulley or pulleys running on a line or lines of wire, chain, rope, or other material, "caused to travel to and fro from end to end of such line by bringing the line into an inclined position, so that the car may descend along it by gravitation"; and, "in order to stop the car when it has descended along the inclined

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line or lines, the car might be caused to run upwards for a short distance on another line or lines rising up from the line or lines along which the car has descended." A drawing shows a line rising up from the one carrying the car, running over pulleys and suspending a weight at the outer end. This is relied upon now as an anticipation of this invention. The rising line there is not, however, a propeller, but a retarder, and is not described as, nor is it capable of use, as constructed, without more, as, a propeller. It could be used as such by substituting a handle for the weight, or perhaps by adding a handle, and is a step towards Goodfellow's invention; but others were necessary to accomplish it, which neither Palmer nor any one else appears to have taken before Goodfellow. George C. Blickensdorfer filed an application October 26, 1885, for a patent on an apparatus for this purpose; and an interference appears to have been declared November 16th between claims of his and of Goodfellow and to have been suspended for their rejection on references to Palmer's patent. Samuel Barr filed an application October 11, 1886, for mechanism for distending the wires, and for a spring catch, for which patent No. 35,449 was granted February 8, 1887. Goodfellow, as assignor to plaintiff, filed an application January 25, 1888, between which and Barr's patent an interference was declared; and January 27, 1888, an application for two separate propeller wires on opposite sides of the track, and a double-wheeled carriage, on which patent No. 381,545 was granted April 24, 1888; and another for a track with a wedge-shaped arm extension at each end, on which patent No. 410,239 was granted September 3, 1889. The interference came on before Commissioner Simonds, who, in deciding it, May 20, 1892, compared the claims, quoting from Barr's specification, and said:

"These remarks lead to the conclusion that the interference issue expresses a construction which is not claimed in said claims of the Barr patent. Nevertheless it seems best to determine the question of priority of invention upon the issue presented, regardless of the fact that such issue and Barr's claims are not identical. Goodfellow's application of June 4, 1885, had a certain Fig. 4 of drawing, and the following are extracts from the specification: 'With these ends in view, I provide * * * the combination of a flexible line or propelling device with the way, extending the length thereof. * * * Fig. 4 shows a side elevation of the application of my propeller to a horizontal way and a carrier thereupon, provided with antifriction wheels to engage the propeller from beneath the way. * * * The same references indicate the same parts in all the figures. In the drawing, F represents the bendable propeller, which may be a flexible cord or strap, or any equivalent device of any desirable bendable material, and extending along the way for a part or the whole of its length, and attached to or near the way as at j.' The construction thus described embodies everything called for in the interference issue, with the exception that only one wire is moved in order to effect a separation of the two wires and propel the carrier from the station. As to that construction, Goodfellow is the first inventor, because it is disclosed in his application of June 4, 1885, which antedates the making of the invention on the part of Barr. The distinction between moving one wire and moving two may or may not be material, in a mechanical and patentable sense. No opinion is expressed upon that point. Its presence in the issue cannot be ignored without doing unwarrantable violence to the plain meaning of a common word. It must be accepted as a feature of the issue. With it accepted as a part of the issue, priority of invention must be and is awarded to Barr."

This finding may not be conclusive, outside the patent office, of the priority of Goodfellow as to propelling the carrier by the means shown

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in his first application; but it is the end of the interference proceedings, and does show that nothing in them adjudged away that priority. The delay in that office is said, however, to have been caused by his abandonment of this first application, and the taking out of the patents on the subsequent ones before taking out this is said to have so superseded this as to make it void. Of course, there cannot be two patents at different times for the same thing, to the same or different persons, and both be valid. The prior patent to the same person would of itself avoid the subsequent one, although the latter should be granted upon a prior application. But these patents do not appear to be for the same invention. The intermediate ones are for differences from and improvements upon that of Goodfellow's first application and last patent. Necessarily the later application somewhat described the apparatus of the first, but they do not claim it, nor so describe it as to of themselves show it to be abandoned. These claims for this mode of propelling the carrier seem, upon this consideration of them, to be valid. The defendant uses this method of propelling a carrier up an inclined way, to run back by gravity. He does not use the elongated two-part wedge of the specification and other claims for retaining the carrier at either end. It is said that without something to retain the carrier at the ends the apparatus would be inoperative, and that the wedge must be read into the claims for that purpose, or the claims must be held void, as for an inoperative thing. The invention covered by these claims is, however, this mode of propulsion, of which Goodfellow seems clearly to have been the first inventor, and by his persistence in the patent office not to have abandoned. Palmer came near it, as for a retarder, but not near enough to see its use as a propeller, and took the clumsy mode of raising and lowering alternately each end of the way to have gravity move the carrier instead. No one else seems to have come so near to it as Palmer before Goodfellow. There were prior carriers, but none of them had anything resembling this as a mode of propulsion. The claims of a patent distribute the parts of the invention described in the specification intended to be covered by each, and these claims seem to well distinguish this part of this patented invention from the other parts without drawing them into it. The right to it does not appear to have been lost, and the defendant appears to have taken it. Decree for plaintiff.

Albert H. Walker and W. S. Kerr, for appellant.
M. B. Phillipp, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. Decree of circuit court affirmed, with costs, on opinion below.

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(106 Fed. 989.)

PELZER v. DALE CO.

(Circuit Court of Appeals, Second Circuit. February 27, 1901.)

No. 91.

PATENTS—INVENTION—ELECTRIC LIGHT AND GAS FIXTURES.

The Stieringer reissue No. 11,544 (original No. 294,697), for a combined gas and electric light fixture, is void for lack of patentable invention, in view of the prior patent to the same inventor, which covered a device for utilizing gas fixtures for electric lights with safety, the improvement on such device embodied in the later patent, by which certain of the arms of the fixture were still used for gas, while the others carried electric lights, being one which would readily occur to a mechanical electrician.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was a suit for infringement of a patent. From a decree dismissing the bill, plaintiff appeals.

The opinion filed below, and here reprinted from 103 Fed. 494, was in full as follows:

SHIPMAN, Circuit Judge. This bill in equity was brought to restrain the infringement of reissued letters patent No. 11,544, dated May 26, 1896, issued to Luther Stieringer, assignor to George Maitland, in lieu of original patent No. 294,697, dated March 4, 1884, for a combined gas and electric light fixture. Another original patent had been issued to Stieringer, dated June 6, 1882, for an improvement in electrical fixtures, and had been reissued as No. 11,478, dated March 12, 1895. These two original patents were declared invalid by the circuit court for the Eastern district of Pennsylvania (Maitland v. Gibson, 63 Fed. 126), which decision was affirmed by the circuit court of appeals (11 C. C. A. 446, 63 Fed. 840). Thereupon applications for reissues of each patent were filed, reissues were granted, the earlier patent was sustained in this court (Maitland v. Archer & Pancoast Co., 72 Fed. 660), and its decision was sustained in the court of appeals for this circuit (29 C. C. A. 607, 86 Fed. 124). The object of the invention described in the reissued patent now in suit was to produce a combined gas and electric light fixture, which should in all material respects have the appearance of the usual gas fixture with radial arms, but in which a part of the projecting arms should be devoted to gas and a part should be exclusively used for electric light. The invention was safe, useful, and successful, while each device of the prior art shown in the record, which attempted to be a combined gas and electric fixture, was a failure. The Stieringer patent was not anticipated, and infringement of its claims 1, 5, and 6 is not denied. The defendant's fixtures are, in material respects, a copy of the patented fixture.

The question of importance is that of patentable invention in view of Stieringer's prior patent, reissue No. 11,478, and this question compels a restatement of what the patentee had done, as shown in the

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earlier patent. The demand for that invention, the gist of it, and its utility were described in the opinion of the court of appeals (29 C. C. A. 607, 86 Fed. 124) as follows:

"Shortly before the year 1881 the means by which Edison's incandescent electric lamp could be introduced into houses and buildings which had theretofore been lighted by gas, and which were supplied with gas fixtures, began to be actively discussed by electricians and mechanics. The public was accustomed to gas fixtures. Much money had been expended in developing graceful and ornamental styles. The fixtures to be used exclusively for the new lamp were undeveloped, and those who proposed to try electricity as an illuminating agent desired to use the class of fixtures to which they were accustomed. The objection to such use was that, if the gas-pipe system was employed as a support for the two electrical wires, the gas-pipe outlet, which connected with the ground, would be a source of constant danger to the safety of the electrical appliances and of the house itself. Underwriters against fire became alarmed, and finally demanded that, where incandescent lights were attached to a gas fixture, or a metallic fixture having a ground connection, the wires should be separated 2½ inches from each other, or should be separated from the metal of the fixtures by some solid insulation. * * * The gist of the invention consisted in making use of metallic gas fixtures by introducing insulated conducting wires concealed within the fixtures, and capable of carrying the electric current to and from the electric lamps; in supporting the fixtures by the gas outlets or gas pipes; and in placing a joint having metallic couplings and an intermediate section of insulating material between the upper end of each fixture and the end of the gas pipe, so as to secure complete insulation of the fixture from the grounded piping of the house. The utility of the invention is acknowledged by the universality of its use without special modification. The gas metallic terminals furnish a strong and convenient support, the insulation avoids the danger which would otherwise result from the use of grounded metallic piping, and the concealed wires are neither unsightly nor liable to abrasion."

What Stieringer did was to make a safe and successful electric light fixture from a gas fixture with radial arms, and unaltered in its external appearance. What he successfully undertook in the new invention was to alter this new fixture so that a part of the arms could be used for gas and a part for electric light; and the way in which he accomplished the desired result was, speaking generally, by preventing the flow of gas into those radial arms which were to be used for electric light, by making openings into those arms for the wires which carry the current to the electric lamp arms, and introducing the two main wires into the space between the ordinary iron gas pendant and the ornamental shell which surrounds it. In the complainant's brief a more particular description is given, which is condensed as follows: In the ordinary gas fixture this central iron pendant is screwed at its bottom into a cast-iron distributing body, from which the gas arms project radially. The distributing body is a small cast-iron box, having a hole in its top for receiving the central gas pipe, and holes in the sides for receiving the arms. The central gas pipe, the distributing body, and the arms are the skeleton of the fixture. This skeleton is surrounded by an ornamental shell. The radial gas arms are usually not so surrounded, being generally made of polished brass. Taking this structure, Stieringer closed the gas passage between the gas distributing body and part of the radial arms, and made openings into these radial arms outside of the distributing body, but within the space formed by the ornamental shell. The electric lamps are mounted upon these radial

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arms, which are cut off from the gas passageway, while the gas burners are carried by the radial arms which remain open to that passageway. For supplying current to the electric lamps, two main wires are introduced into the space between the ornamental shell and the central gas pipe. They enter that space below the upper end of the central gas pipe, but above an adjustable canopy. Openings are made in the top of the ornamental piping to permit the passing of the wires into this space. These main wires pass down alongside of the central gas pipe, but inside of the ornamental piping, and enter the space between the gas distributing body and the ornamental shell. The electric lamp arms are provided each with two wires, which pass from the electric lamp socket through that arm into the space around the distributing body, where the two arm wires are connected with the two main wires.

It will thus be seen that, having utilized the old gas fixture so as to make it safe for electric light purposes, the patentee, in his second invention, permitted a part of the arms to be used for gas purposes, and sent the electric current through main wires placed in the space between the central pendant and the external shell. This use of that space was not novel, but had been customary in devices for electrically lighting gas fixtures. If one places himself at the point of time prior to the earlier invention, there is, as it seems to me, little difficulty in seeing inventive genius in the entire result of a combined gas and electric light fixture; but when the practical difficulties in the way of safety had been surmounted, and an electric light fixture had been obtained from a gas fixture, I see no inventive genius in permitting the new electric fixture to accomplish in part its original object,—that of furnishing light by gas. The accomplishment of the result would have been difficult for a mechanic of another class, but to the mechanical electrician the important feature of the invention, which was to place the main wires in the vacant space between the pendant and the shell, and connect them with the wires in the electrical radial arms, was a simple matter. I therefore think that Stieringer's improvement upon his first invention, although novel, useful, and still utilized by persons who desire to have in their houses means for the immediate use of either illuminant, has not the element of patentable invention. The bill is dismissed, with costs.

Richard N. Dyer, for appellant.

Henry M. Brigham, for appellee.

Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. Decree of circuit court affirmed, with costs, on opinion below.

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(106 Fed. 989.)

ROTHSCHILD et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. February 27, 1901.)

No. 74.

DUTY ON WRAPPER TOBACCO—PERCENTAGE SYSTEM.

Except for the purpose of imposing a penalty for importing a bale containing more than 15 per cent. of wrapper and less than 85 per cent. of filler, any percentage system is abandoned in the tariff act of 1897; and all wrapper tobacco, wherever found, and in whatever amount, is subject to the duty of $1.85 per pound, provided in paragraph 213 of said act.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Appeal from a judgment of the circuit court, which sustained the decision of the collector of the port of New York and reversed the decision of the board of general appraisers, touching the duty on certain wrapper tobacco found packed in bales of filler tobacco, but not exceeding 5 per cent. of each bale.

The opinion filed below, and here reprinted from 87 Fed. 798, was in full as follows:

LACOMBE, Circuit Judge. Amid the awkward, tortuous, and obscure phraseology of paragraph 246 of the act of 1883, one thing was manifest, namely, that, in determining whether any particular leaf tobacco should pay a lower or a higher rate, it would be necessary to calculate a specified percentage—of something. It became absolutely necessary, in order to apply the rule prescribed in the paragraph, to determine upon what base or on what unit such percentage should be calculated. In Falk v. Robertson, 137 U. S. 225, 11 Sup. Ct. 41, the court had to deal with an abnormal, if not a bogus, bale; and it is not surprising that the language used in the opinion was not practically of much use when normal commercial bales came under consideration. The necessity of finding a base number or unit available for such cases could not be overlooked. U. S. v. Blumlein, 5 C. C. A. 142, 55 Fed. 383. Such a unit was declared to be the bale, and it is understood that the conclusion upon that point reached in that case has not since been questioned. Erhardt v. Schroeder, 155 U. S. 124, 15 Sup. Ct. 45; U. S. v. Rosenwald, 14 C. C. A. 399, 67 Fed. 323. The McKinley tariff of 1890, however, concededly abandoned the practice of taxing according to percentages. Under that act it was wholly unnecessary to fix upon any base number or unit at all. Quite possibly, the percentage method was restored by the Wilson tariff of 1894, indirectly by the use of the words "commercially known"; but there seems much force in the suggestion that, when those words were dropped out of the Dingley tariff of 1897, the percentage system dropped with them. Of course, if the percentage system were abandoned, the necessity of determining a unit or base number ceased also, and the decisions in the cases cited would be no longer instructive.

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Construing the phraseology of the act of 1897 without reference to the earlier statutes and decisions, the correct paraphrase of the paragraphs 213 and 214, so far as they relate to unstemmed leaf tobacco, may be stated thus:

"A duty of 35 cents per pound shall be paid on (A) all leaf tobacco not suitable for cigar wrappers, and not otherwise provided for.

"A duty of one dollar and eighty-five cents per pound shall be paid on (A) all leaf tobacco of any kind, and wherever grown, which may be packed or mixed with any other leaf tobacco which other tobacco is the product of any other country or dependency; (B) all leaf tobacco not suitable for cigar wrappers, which shall be found to be mixed or packed with more than fifteen per cent. of tobacco which is suitable for cigar wrappers; (C) all leaf tobacco suitable for cigar wrappers."

The language used in the act seems to indicate that the draftsman has tried to cut loose from earlier legislation and the decisions predicated thereon; and the case seems to be one where the language of the later act may fairly be construed without much regard to the construction put upon earlier and much more intricate phraseology. I am strongly of the opinion that, except for the purpose of imposing a penalty on any one importing an abnormal bale (i. e. as the evidence shows, one with more than 15 per cent. wrapper, to less than 85 per cent. filler), any percentage system is abandoned in this tariff, and that all wrapper tobacco, wherever found, and in whatever amount, shall pay the higher rate. Inasmuch as the case will undoubtedly be appealed, it seems unnecessary to discuss the question presented at any greater length. Decision reversed, and collector sustained.

E. R. Gunby, for appellant.
John S. Wise, Special U. S. Asst. Atty.

Before WALLACE and SHIPMAN, Circuit Judges.

PER CURIAM. Decision of circuit court affirmed.

(106 Fed. 989.)

THE VULCAN and THE GENEVIEVE.

(Circuit Court of Appeals, Second Circuit. February 7, 1901.)

Nos. 10, 11.

1. COLLISION—SUIT FOR DAMAGES—DETERMINING FAULT.
   In determining, on conflicting testimony, which of two vessels was in fault for a collision, the court will take into consideration the probabilities and presumptions based upon the skill, knowledge, and ability of the crews of the respective vessels, which was the better manned, and the less likely to make a mistake.
2. SAME—STEAM VESSELS MEETING—SIGNALS.
   Where the one of two meeting steam vessels having the right of way fails to signal as required by the rules governing navigation on the lakes (28 Stat. 645), on approaching the other may properly signal by two blasts, in accordance with rule 23, meaning, "I am directing my course to port," and she is not required to wait for an answering signal before changing her course.[1]

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[1] As to signals of meeting vessels, see note to The New York, 30 C. C. A. 630.

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3. SAME—EVIDENCE OF FAULT.

Where a steam vessel passing down the Detroit river in the night, and having the right of way, failed to signal, as required by the rules, when half a mile from a vessel passing up, and, on receiving a signal from the latter vessel when nearer, answered by a cross signal, changed her course accordingly, and continued at full speed, in violation of rule 26, although the vessels were then near together, she must be held in fault for a resulting collision.

Appeals from the District Court of the United States for the Northern District of New York.

Cross libels by the steam tug Genevieve and the propeller Vulcan to recover damages for collision. These appeals are from a decree in favor of the Vulcan.

The opinion filed below, and here reprinted from 96 Fed. 859, was in full as follows:

COXE, District Judge. The collision occurred at 3 o'clock a. m., October 17, 1897, between the steam propeller Vulcan and the tow of the steam tug Genevieve, opposite Mamajuda Island in the Detroit river. The Vulcan is 260 feet long and 38 feet beam. She was bound up the river with a load of coal and was drawing 16 feet of water. She was properly manned and equipped; she was fitted with all the modern appliances and had the full complement of officers and men. At the time of the collision her master and mate were on the pilot house, the steersman was at the wheel and there was a lookout at the bow. She was proceeding at the rate of about 9½ miles an hour. The Genevieve is 55 feet long, 15½ feet beam and was, at the time in controversy, drawing 9 feet aft and 5 feet forward. She was towing a flat-bottomed scow 127 feet long and about 30 feet beam. The scow was square-ended with a long overhang at each end. She carried a large derrick forward with a boiler and engine house 16 feet wide, 40 feet long and 10 feet high. In front of the derrick was a frame 35 feet high and 40 feet wide at the base. The scow was drawing about 4 feet of water. She was fastened to the tug by an 80-foot hawser and a bridle. There was a cross timber 47 feet from her bow projecting out beyond the sides of the scow. The night was dark but clear. Lights could be seen a long distance off. There was no wind. Both the Vulcan and the Genevieve displayed the proper lights. There was a lookout on the tug stationed just forward of the pilot house and there was a wheelsman at the wheel. These two men composed the entire deck crew of both tug and tow. No one was on the scow. The tug was proceeding down the river at the rate of about 7½ miles an hour. The stem of the Vulcan struck the tow a little forward of midships on the port side at the angle made by the projecting timber. The blow caused damage to both vessels but principally to the scow which was so badly injured that she sank soon afterwards.

The cause for such collisions as this must generally be sought for at a time prior to the few moments immediately preceding the impact. After the vessels are in close proximity either or both, in the stress of sudden danger, may adopt an unwise and imprudent course.

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The question is, who is to blame for bringing the vessels into a position where cool calculation is impossible?

In arriving at a correct answer to this question the court should take into consideration the probabilities and presumptions based upon the skill, knowledge and ability of the crews of the respective vessels. Which of the two would be most likely to make a mistake? The Vulcan was engaged in a business which required her to pass up and down the Detroit river many times a year in daylight and at night. Her master and mate were experienced mariners and in the prime of life. They were perfectly familiar with the channel, the lights and the ranges. At the time of the collision both of them were on the pilot house high above the water and thus able to get a commanding view of approaching vessels and to judge distances with accuracy. In addition to the master and mate was the lookout and steersman. The Genevieve, on the contrary, had but one man on deck and one man in the pilot house. Both were licensed pilots and sailors of long experience, but both were old men, probably over 60 years of age, and neither, of late years, had much experience in the navigation of the Detroit river. They were unfamiliar with some of the ranges and some parts of the channel and, being but a few feet above the water on the night in question, had not the same opportunity for extended vision as the crew of the Vulcan. It certainly is a fair statement to assert that the Vulcan was much better manned and less likely to make a mistake in navigation than the Genevieve.

When the first signal was given the vessels were separated by half a mile in distance and two minutes in time. The witnesses on the Vulcan agree substantially that the distance was less than half a mile. The two witnesses on the Genevieve are not in accord; one places it at between a quarter and a half a mile; the other at between three-quarters of a mile and a mile. It would be against the weight of evidence to place the distance at more than a half a mile.

The sailing rule applicable to the situation is rule 24 of the act of February 8, 1895. It is as follows:

"That in all narrow channels where there is a current, and in the rivers Saint Mary, Saint Clair, Detroit, Niagara, and Saint Lawrence, when two steamers are meeting, the descending steamer shall have the right of way, and shall, before the vessels shall have arrived within the distance of one-half mile of each other, give the signal necessary to indicate which side she elects to take."

Here, then, was a plain duty imposed upon the Genevieve. The vessels had reached the half-mile distance. Before that point was reached the Genevieve was commanded to signal the Vulcan the side she desired to take. The command was disobeyed and the duty wholly neglected. This, in the judgment of the court, was the initial fault to which all the others can be easily traced. This fault was committed deliberately and intentionally. Capt. Pratt, who was in charge of the Genevieve, says he did not blow a signal and did not intend to blow any. He thought the vessels would pass without any communication between them and he expected to take the chances and remain quiet. When the first signal was given he thinks the Vulcan was not much more than a quarter of a mile distant.

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It is, of course, idle for the tug to contend after this testimony, that the half-mile point was not reached and that she might have signaled had not the Vulcan anticipated her. The evidence shows that the Vulcan waited till the last moment before indicating the course. She did not act in this regard until it was perfectly evident that the Genevieve intended to pass without signal of any kind. The Vulcan saw the Genevieve when the vessels were a long distance apart, the former being still on the Limekiln ranges. When the Vulcan had turned upon the Grosse Isle range and was coming up on a course a little to the westward of that range her attention was particularly directed to the Genevieve. According to the testimony on behalf of the Vulcan the tug was coming down on a course to the eastward of the course from Grassy Island to Mamajuda Island, showing both lights. After waiting for a signal until it was evident that none would be given the Vulcan blew two blasts and put her wheel to starboard as required by rule 23.

The Vulcan is criticised for starboarding before she received a reply to her signal. The answer is twofold: First, the time was so short that prompt action was imperative, there was no time for experiments; and, second, the Vulcan did precisely what the rule requires—"two blasts to mean, 'I am directing my course to port.'" The rule does not say that two blasts shall mean, "I intend to direct my course to port," or "I will direct my course to port if you agree to it." What it does say is this, "I am now, at the moment you hear this signal, swinging to port."

No fault can be imputed to the Vulcan in giving the signal. Upon her own testimony such a signal was not only proper; it was absolutely necessary. Not to have given it would have been gross negligence.

But even upon the testimony of the two witnesses for the Genevieve the Vulcan was not at fault. It is asserted that if the vessels had kept their courses both remaining silent they would have passed in safety. Conceding this to be so it would be a strange proposition to hold that it is negligence per se for a heavily laden upbound vessel to request the port side of the channel of a descending tug when there is absolutely no question that they can pass safely starboard to starboard. The Genevieve had indicated no preference and it was apparent that they would meet at or near a point where it was necessary for the Vulcan to swing to port in order to make the Grassy Island range.

The two-blast signal from the Vulcan was answered by the Genevieve by one blast, meaning, "I am directing my course to starboard," and her pilot immediately put her wheel to port. This was a cross signal forbidden by rule 26. But the witnesses for the tug assert that they heard but one blast. That two blasts were given is beyond dispute. The master, mate, lookout, engineer and a passenger on the Vulcan all swear positively to this and the subsequent signals.

If it be true that those on the tug did not hear the signal the question arises, why did they not hear? The night was clear, there was no wind, nothing in the elements prevented sounds from being heard,

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and the Vulcan's whistle, in such circumstances, should have been heard miles away. If it were not heard because those in charge of the tug were deaf, or inattentive or in positions where it was impossible to hear, it was negligence for which the tug is responsible. That the situation on the tug was somewhat extraordinary in this respect is further evidenced by the fact that no one on the tug heard a two-blast signal which was given but a moment or two before the collision. But in no view of the matter can the Vulcan be charged with negligence because the Genevieve did not hear her signal. The Vulcan blew a proper signal and was answered by an improper signal. She knew then that the Genevieve intended to turn towards the same side of the river as herself and that prompt action only could avoid a collision. The Vulcan again blew two blasts, checked down, blew two more blasts and reversed. When the collision occurred the Vulcan had almost come to a standstill. The blow to the scow was a light one; it was hardly felt on board the Vulcan who received no injury save a cracked plate at the bow.

There were but two affirmative acts on the part of the Genevieve and both were wrong. She gave the wrong signal and turned in the wrong direction. No signal was given to the engineer of any kind and the tug kept on at full speed in defiance of rule 26, which commanded her master "to reduce his speed to bare steerageway, and, if necessary, stop and reverse." The excuse for this uncontradicted violation of the law is that the danger was so imminent that it would have done no good to stop and reverse. Having disobeyed the law the onus is strongly upon the tug to establish the truth of this proposition. This she has not done; on the contrary it is quite clear that if there had been any collision at all it would have been so slight as to cause little or no damage.

It will be remembered that the Vulcan checked and reversed in rapid succession as soon as the peril became apparent, and yet it is charged against her as a fault that she did not do this sooner. "The Vulcan was in fault," says the brief, "for not stopping and reversing immediately upon getting the single blast. The mate did not stop to reverse, he merely checked, and it was only after he had repeated his signals that the engines of the Vulcan were reversed upon the captain's order to the mate. This was inexcusable."

To the mind of the court it seems somewhat inconsistent to assert, on the one hand, that the delay of a few seconds in reversing was inexcusable fault on the part of the Vulcan and, on the other, that the Genevieve, with the same danger confronting her, was absolutely free from fault although she did not check or reverse at all but rushed ahead at full speed.

Upon the proof there can be no question as to the negligence of the tug. Two open and flagrant violations of law are established without dispute. She omitted the signal required by rule 24; she failed to reduce her speed, stop and reverse, as required by rule 26. It is, therefore, unnecessary to examine the other faults alleged against her.

An able and ingenious argument is advanced on behalf of the tug to convince the court that the Vulcan should be inculpated also. The faults charged against her are as follows: First. That she crowd-

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ed upon the course of the tug. Second. That after giving the first signal she should have waited till the tug answered before changing her helm. Third. That the second signal of two blasts was a cross signal forbidden by the rule. Fourth. That she did not reverse soon enough. Fifth. That she did not sound an alarm. Sixth. That she did not keep out of the way of the tug. Seventh. That she should have signaled, if at all, for the right instead of the left side.

Some of these accusations have already been answered, others are based upon the hypothesis that the court will accept the uncertain and, in some respects, contradictory statements of the two witnesses for the tug, denied as they are by the witnesses for the Vulcan, and others still are unimportant for the reason that by no possibility could the omissions have changed the result. The entire testimony has been read with the result that the court is unable to point out any act or omission of the Vulcan which, considering the well-recognized rules of maritime law, can be regarded as a fault. Both Capt. Pratt and Capt. Day admit their unfamiliarity with the navigation of the Detroit river. Their lives as mariners have been spent principally upon other waters and their trips on the river of late years have been casual and infrequent. The statement made by Capt. Pratt at Detroit, immediately after the accident, differs, in at least two important particulars, from his testimony in court. It is thought that an impartial reader of the record will find it impossible from the testimony of these two witnesses to locate with accuracy the course of either vessel after they came within sight of each other. It is conceded on all hands that after the tug replied with one blast and put her wheel a-port, the danger was so near that the rule of in extremis applies. Both Pratt and Day testify that when they heard the second signal from the Vulcan they could do nothing to avert the accident; they had turned to the right and could not get back again. The signals from the Vulcan at this time were, in fact, an alarm. They were two blasts followed immediately by two more blasts. In this way the Vulcan was enabled to convey to the tug not only the idea of immediate danger, but also the information that the Vulcan was swinging to port, and so those on the tug understood it.

The Vulcan must be judged not in the light of the facts as they now appear but in the light of the facts as they appeared to her master and mate as they stood upon her pilot house on the morning in question. The conduct of the tug was surely sufficient to puzzle the most accomplished and prudent mariner and the court is convinced that the Vulcan did everything which was possible in the circumstances to prevent the collision. The City of New York, 147 U. S. 72, 85, 13 Sup. Ct. 211.

The Lorain Steamship Company, the owner of the Vulcan, is entitled to a decree.

George Clinton, for appellants.
John C. Shaw, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. Decrees of district court affirmed on opinion below.

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(106 Fed. 989.)

THE WEST BROOKLYN.

(Circuit Court of Appeals, Second Circuit. March 11, 1901.)

No. 113.

COLLISION—EXCESSIVE SPEED—FOG.

A tug returning from sea with two dumps in tow on a hawser collided at about 12 midnight, in a thick fog, with a ferryboat. Both boats gave proper signals, which were heard by each some four or five minutes before the collision, which occurred at about right angles. Each claimed that his own boat was stopped at the time of the contact. This evidence was rendered improbable from the severe injuries suffered by both vessels. The lights of the colliding vessels were discovered at a distance of from 100 to 200 feet. *Held*, that both vessels were in fault, in not sufficiently reducing their speed so as to have been able to come to a full stop after the discovery of the lights.

Appeal from the District Court of the United States for the Southern District of New York.

This was a libel by the owner of the tug J. A. Dumont to recover damages for a collision. This appeal is from a decree for libelant for half damages.

The opinion filed below, and here reprinted from 106 Fed. 751, was in full as follows:

BROWN, District Judge. The collision occurred in the main ship channel, off the lower end of Governor's Island, at about 11:45 p. m. of December 9, 1897, in thick fog. The libelant's tug, J. A. Dumont, was returning from sea, with two dumps in tow upon a hawser. The ferryboat was bound from the Battery to Thirty-Ninth street, South Brooklyn. She met with thick fog before reaching Port William, passed to the westward of it on her usual course, and soon heard the fog signals of the Dumont a little on her starboard bow. Her signals were one long and two short whistles, indicating a tow. The ferryboat gave the proper signal, and both sides agree that these signals were heard by each, some four or five minutes before the collision. The collision occurred at about right angles, as both also agree. Each side claims that his own boat was stopped in the water at the time of contact, and each contends that it did not change much from its proper course. The tug admits porting a point or two. Both agree that the lights could not be seen above 100 or 200 feet off.

I have carefully considered the evidence on all the contested points. I am satisfied that neither boat was stopped at the time of collision. Had the tug been stopped, as contended, it is impossible that such a dent could have been made in the side of the ferryboat as was made in the wearing piece of the guard; had the ferryboat been stopped, it is impossible that such marks could have been made near the tug's bitts, or so much broken and carried away of her stem and starboard bow.

2. The pilot's testimony is very positive that at the time of collision, he was heading S. ½ W., and that the place of collision was too much to the northward to admit of turning to port to make the course

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towards the Brooklyn landing. In that situation, had both vessels kept their ordinary courses, the angle of collision would not have exceeded one or two points at most. It is in the highest degree improbable that the ferryboat at that place should have been turned so as to run upon the flats near Governor's Island; and I have no doubt, therefore, that the principal part of the change in order to make the collision nearly at right angles, was due to a change of course by the tug; and the evidence indicates that this may have been in part, at least, owing to inaccuracy in the compass, the deviation of which was not known to the pilot of the tug.

The collision was partly due, therefore, to the course of the tug too much to the eastward, either by some general error in her course, or, as is more probable, from porting when the pilot thought he heard the ferryboat's whistle on his port bow. There is great liability to err in locating the position of sound in fog (The Lepanto [D. C.] 21 Fed. 651, 657); and if the tug had been on the proper course upstream in that locality when the ferryboat's whistles were first heard, the whistles must have been either nearly dead ahead, or a little on the starboard bow instead of on the port bow. But besides this, the tug in so dense a fog and with a tow on a hawser behind her, ought to have proceeded more slowly after the ferryboat's whistles were heard, so as to be able to come to a full stop in the water before collision after the ferryboat's lights were seen 100 or 200 feet distant. The same obligation rested on the ferryboat also. The fact that the collision was at right angles and not nearly head and head, made it easier for each boat to come to a full stop in the water before collision. There was abundant time for this after the signals were heard by each. Had either sufficiently reduced her speed, as she was bound to do, it is plain that upon a right-angled collision no serious damage could have been done by either to the other.

The libelant is therefore entitled to a decree for half damages only.

Le Roy S. Gove, for appellant.
James K. Symmers, for appellee.

Before LACOMBE and SHIPMAN, Circuit Judges.

PER CURIAM. Affirmed on opinion of district judge.

(105 Fed. 733.)

HAUSS v. LAKE ERIE & W. R. CO.

(Circuit Court of Appeals, Sixth Circuit. January 14, 1901.)

No. 831.

1. EMPLOYERS—DUTY TO EMPLOYE.

A railroad company which is constructing new switches does not owe the duty to a brakeman of blocking a frog, which is a part of the new construction, during progress of the work; it being impracticable to block it till the tracks are ballasted and the alignment of the rails of the frog is perfected. Giving him such notice and warning as will put him on his guard against the dangers from use of the track while the work is in progress is enough.[1]

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[1] See note at end of case.

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2. SAME—NOTICE.

Notice to a brakeman that digging is being done between the ties at a certain place, with warning that he look out for it and avoid injury, is sufficient, without mentioning the danger from the unblocked frogs, especially where the work has been for two weeks within his daily view and observation while passing on his train.

3. WITNESS—CREDIBILITY—QUESTION FOR JURY.

Though, in an action against a railroad for death of a brakeman, the only direct evidence that notice of the danger was given deceased is the testimony of the conductor, whose duty it was to bring the bulletin in regard to it to the knowledge of the trainmen, his credibility is not for the jury, on the ground of his interest to show that he had done his duty; his testimony not being contradicted or brought in question by cross-examination or the admitted facts, and there being nothing else in the case tending to raise a doubt as to the truth of his testimony.

In Error to the Circuit Court of the United States for the Northern District of Ohio.

The evidence shows that on the 10th day of June, 1898, at Muncie, Ind., the plaintiff's intestate, William V. Doty, a brakeman in the defendant's service, while coupling cars, received injuries of which he died within a few hours. At the time of his death he was in the twenty-fourth year of his age, and had been in the service of the defendant, as a brakeman, for about 18 months. He was employed on a freight train which passed daily over defendant's railroad between Tipton, Ind., and Lima, Ohio; and on the day of the accident his train came east, with eight cars, for Muncie, which were to be detached from the train and left at that place. For 10 days or 2 weeks next before the accident the defendant had been constructing two new switches near the place of the accident, and on that day the work was still in progress. Just before the arrival of Doty's train, several cars carrying gravel to ballast the new tracks had been unloaded near the place of the accident, and were standing on a storage track, on which the Muncie cars from Doty's train were to be placed, and, it being necessary to move them out of the way, the cars from Doty's train were backed in, to be coupled to them; and while the cars from Doty's train were backing, and while Doty was walking inside of the track behind them, keeping pace with their movement, his right foot was caught and held in an unblocked frog until they backed over him, causing the injuries of which he died. It was the usage and practice of the defendant to keep the frogs in its line of railroad blocked, but this particular frog was a part of the new construction, and had not been blocked because it was not practicable to block it until the tracks were ballasted and the alignment of the rails of the new switches with the alignment of the rails of the frog was perfected. The accident occurred about 11 o'clock of the forenoon, and the day was bright and clear, and there was nothing to obstruct the view of the track. During the 10 days or 2 weeks during which the new construction had been in progress, Doty passed by it daily, going east and west with his train. A bulletin which reads as follows:

"Sent to	Time Sent	Sender	Receiver
Po			n
pd	7:37 p. m.	B	Tn
Gx		n	Gy
	From	5|30th	1898.

To all Cond Rd
All Trains East Gx
West Po

"Digging is being done between ties around Muncie yard office, and quarter mile west of yard office. Look out for it, and don't get injured.

S. R. K."

—was put on the train register in the yard office at Muncie, to which all trainmen had access, and it remained there until the work was completed. The conductor of Doty's train testified in chief concerning this bulletin as follows: "Q. Explain to the court and jury how those bulletins were han-

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died, with relation to trainmen. A. They manifolded, eight or ten taken on manifold paper at a time; and each train going through Muncie, the conductor got them and showed them to the trainmen, to all concerned in the matter, to look out for new work being done at Muncie. Q. I will ask you if you received a copy of this message, which is marked 'Exhibit No. 2,' at Portland on the 9th, and also at Alexandria on the 10th? A. Yes, sir; that is a copy of it. Q. What is meant by 'Gx'? A. The station at Alexandria. Q. And 'Po'? A. Portland. Q. 'S. R. K.'? A. S. R. Kramer. Q. What did you do with this bulletin after you got it, so far as Mr. Doty was concerned? A. I told Mr. Doty about it, and showed it to him. He read it and handed it back to me. Q. Which one? A. The one at Portland, going west, and the one at Alexandria, going east. Q. You showed him the one at Portland on the 9th? A. Yes, sir. Q. And the one going east on the 10th at Alexandria? A. Yes, sir. Q. How often during the continuance of this work were these bulletins handed to trainmen? A. Every train that went in either direction, every day and night, as the case might be." And on cross-examination further testified: "Q. You knew that this bulletin you had did not say anything about unblocked frogs, but to look out for digging that was being done at Muncie? A. Yes, sir. Q. That was the only bulletin you had, was it? A. Yes, sir." Upon this state of fact, the plaintiff complained that the injuries of which Doty died were caused by the negligence of the defendant in failing to block the frog in which his foot was caught, in accordance with its established usage and practice. But the defendant contended that, as it was neither usual nor practicable to block the frog during the progress of the work, it owed no duty to Doty in respect thereto, other than to notify him that the work was being done, and to warn him of the danger incident to the use of the track while it was in progress, and alleged that it did so notify and warn him, and that his injuries, therefore, were not caused by any fault on its part. On the trial before a jury at the close of the evidence the trial judge sustained the contention of the defendant, and directed a verdict in its favor.

Henry W. Seney, for plaintiff in error.

Charles T. Lewis, for defendant in error.

Before DAY and SEVERENS, Circuit Judges, and THOMPSON, District Judge.

THOMPSON, District Judge, after stating the case as above, delivered the opinion of the court.

We agree with the learned judge who presided at the trial in the court below that the defendant was not required to block the frog during the progress of the construction, and that the only duty which it owed to the plaintiff's intestate, under the circumstances presented by the evidence, was to give him such notice and warning as would put him upon his guard against the dangers incident to the use of the track while the work was in progress. It is urged, however, that the notice was insufficient because it failed to call attention to danger from unblocked frogs. It did call particular attention to the track, and to what was being done there. It is true, there was no attempt to point out all the possible or probable elements of danger which might arise out of the changes being made in the track, but the trainmen were required to look to the track and avoid being injured because of the work being done there. This was sufficient notice, especially in view of the fact that what was being done there was within the daily view and observation of Doty as his train passed through Muncie.

The only direct evidence of notice to Doty was the testimony of Jeffries, the conductor of the train; and it is suggested here, for the

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first time in the progress of the case, that his credibility as a witness was put in issue by his relation to the parties and to the subject-matter of the controversy, and that the cause should have been submitted to the jury upon that issue. The suggestion is that the witness, as an employé of the defendant, whose duty it was to bring the bulletin concerning the work at Muncie to the knowledge of the trainmen, had an interest in showing that he had performed the duty, and strong motive to falsely represent that he had done so, if in fact he had not performed the duty, and that this interest and possible motive raised a question as to his credibility, which should have been considered by the jury. The testimony of the witness was not contradicted by that of any other witness, nor was it brought in question by the cross-examination nor by the admitted facts of the case; and, outside of the suggested interest and motive, there is not a fact or circumstance in the case which tends to raise a doubt as to the truth of his testimony. It is said in Elwood v. Telegraph Co., 45 N. Y. 554, that:

"Very clear and decisive evidence was required in this case to establish that the message which came over the defendant's wires was not communicated in the natural and ordinary manner. From the necessity of the case, such evidence as there is to that effect proceeds wholly from parties having an important interest in the question. Each of them, if guilty of the negligent act, would have the strongest motive to deny it, as the admission would subject him or her to severe responsibility for the consequences. This is a controlling consideration in determining whether the statements of these witnesses should be taken as conclusive."

But in that case the admitted facts necessarily raised the question of the credibility of the witnesses. A telegram had been received at Pithole over the wires of the telegraph company, and delivered by the company's agent at Pithole as coming from Titusville. The telegraph company denied sending it from Titusville, and the operators at the Titusville office testified that it was not sent by them from that office, and the court say that:

"The only theory by which the testimony of the operators is sought to be reconciled with the conceded fact of the receipt of the message at Pithole over the defendant's wires is that the wires were cut by McCarthy, or a confederate, at some intermediate point, and a machine there applied, whereby the message was transmitted. And it is claimed that the court was bound to solve the difficulty by presuming that this was actually done, rather than to permit the jury to pass upon the credibility or accuracy of recollection of the witnesses."

In Hankinson v. Electric Co., 175 Mass. 271, 56 N. E. 604, decided February 28, 1900, brought to recover damages for personal injuries occasioned the plaintiff by being struck in the eye by a burnt carbon thrown by one Bayrd, who was in the defendant's employ, Bayrd testified:

"I did not throw it at the team for any purpose connected with my business, but to attract his attention. I wanted to attract his attention, so as to speak to him; and I threw the carbon at the team, so as to attract his attention, so that I might speak to him, and not for any business connected with the company."

The defendant contended that there was no evidence on which the jury could find that the carbon was thrown by Bayrd for the purpose of performing the work of the defendant, but the court say:

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"When the defendant's liability depends upon the purpose with which an act that is nearly neutral, so far as outward manifestations are concerned, is done, it would be strange if the jury were not at liberty to disbelieve the testimony of one employed by the defendant as to his mental processes. In that connection it was proper for the jury to take into consideration the fact that not only was this witness at the time of the trial in the employ of the defendant, but also that he had been taken back into its employ only two weeks before the trial; and the jury may have also believed that, from the terms in which his testimony was couched, it was evident that the witness had a particular knowledge of what the law required to exonerate the defendant from liability. We are of opinion that it was a question for the jury whether the explanation given by Bayrd of the purpose he had in throwing the disused carbon was true or not."

The impeaching circumstances in that case, outside of the mere fact that the witness was in the employ of the defendant, justified its submission to the jury.

In Bank v. Deifendorf, 123 N. Y. 200, 25 N. E. 404, the court say:

"The claim that the plaintiff's cashier was a disinterested witness, whose testimony must be regarded as controlling if not contradicted, cannot be sustained. Aside from the alleged improbability of his statements, he was the financial agent of the plaintiff, and the owner of one-fifth of its capital stock, and, aside from his direct interest, responsible to his principal for the care, fidelity, and prudence with which he discharged his official duties. His interest in the transaction was co-extensive with that of the plaintiff, and brings him directly within the cases which hold that the credibility of such a witness is a question for the jury to determine."

In these cases there were not only impeaching circumstances which necessarily raised the question of credibility, but it was insisted upon by the party interested. In the case at bar the question was neither made nor in any way suggested by the plaintiff or his counsel at the trial, nor do the facts and circumstances of the case justify an impeaching presumption against the credibility of the witness, founded upon his mere relation to the parties and to the subject-matter of the controversy, which should overcome the counter presumption that, as an uncontradicted witness, testifying under oath, he spoke the truth. The judgment of the court below therefore will be affirmed.

NOTE.

Duty of Railroad Companies to Block Switches.

1. In General.

[a] (Iowa Sup. 1890) In an action against a railroad company for the death of a brakeman, the evidence showed that the brakeman was run over while uncoupling cars, that the accident was caused by his foot catching between the rail and the switch rail, and that, if the switch had been properly constructed, the space between said rails would have been too great to allow his foot to catch. *Held*, that the company was liable.—Brooke v. Railway Co., 47 N. W. 74, 81 Iowa, 504.

[b] (Minn. Sup. 1885) It is the duty of a railroad company to block its switches, where it is shown that it can be practicably and reasonably done, and a failure to do so is negligence.—Sherman v. Railway Co., 25 N. W. 593, 34 Minn. 259.

[c] (Mo. Sup. 1887) When it is clear that the blocking of guard rails adds to the security of the employés, and that the company has made use of them on some parts of its road, a verdict against the company for the death of a yard master, who got his foot caught in an unblocked guard rail, and was run down, will not be set aside on the ground that there is no evidence to show negligence.—Huhn v. Railway Co., 4 S. W. 937, 92 Mo. 440.

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[d] (Mo. Sup. 1892) Where plaintiff's arm was caught and crushed between the guard rail and the main rail, the failure of defendant to block the guard rail should not be submitted to the jury as ground for a recovery, since the blocking is only intended to prevent the feet from being caught.—Rutledge v. Railway Co., 19 S. W. 38, 110 Mo. 312.

[e] (Utah Sup. 1890) It is negligence to use, at a station where there are several tracks, and where couplings are required to be made promptly, open instead of blocked frogs, whereby the feet of employés making couplings are liable to be caught.—Seley v. Railway Co., 23 Pac. 751, 6 Utah, 319.

2. Statutory Provisions.

[a] (U. S. C. C. A., Ohio, 1895) Where a statute requires switches to be blocked, noncompliance therewith is negligence as a matter of law.—Railroad Co. v. Van Horne, 16 C. C. A. 182, 69 Fed. 139.

[b] (U. S. C. C., Ohio, 1889) Act Ohio March 23, 1888, for the protection of railroad employés, requires every railroad in the state "to adjust, fill, or block the frogs, switches, and guard rails on its tracks," so as to prevent the feet of its employés from being caught therein. *Held* that, where two railway companies receive cars from each other over a delivery track at a certain point, a person employed by one of them to take the number of its cars, and inspect their seals, as trains are made up at such place by the other, is an employé of the latter, within the meaning of this statute.—Atkyn v. Railway Co., 41 Fed. 193.

[c] (Mich. Sup. 1894) 3 How. Ann. St. § 3397a, requires railroad companies to block their switches. By the method used by defendant, the flanges of the car wheels, in a few days, would wear the blocking so that it would be two inches below the rail. There were other systems of blocking in common use, which prevented the wheels from wearing down the blocking. *Held*, that the system used was not a compliance with the statute, and rendered defendant liable to an employé who was injured by having his foot caught in the switch by reason of the defective blocking.—Eastman v. Railway Co., 60 N. W. 309, 101 Mich. 597.

3. Effect of Custom or Usage.

[a] Where the utility of blocking a switch had not been established, a railroad could not be held liable for a failure to block its switches, in the absence of a showing that, as constructed, they were not reasonably safe. —(Ill. Sup. 1886) Railroad Co. v. Lonergan, 7 N. E. 55, 118 Ill. 41; (Mich. Sup. 1882) McGinnis v. Bridge Co., 13 N. W. 819, 49 Mich. 466.

[b] (U. S. Sup., Utah, 1894) It is not negligence to use unblocked frogs in a railroad freight yard, whereby the feet of employés coupling cars are liable to be caught, it appearing that unblocked frogs are generally used in the same section of the country, and that it is doubtful whether they are not the better kind.—Southern Pac. Co. v. Seley, 14 Sup. Ct. 530, 152 U. S. 145, 38 L. Ed. 391, reversing Seley v. Railway Co. (1890) 23 Pac. 751, 6 Utah, 319.

[c] (Ind. Sup. 1894) Where none of the frogs at any of the switches on a railroad are blocked, no recovery can be had by a brakeman, experienced on that road, for injuries suffered from having his foot caught in one of them.—Sheets v. Railway Co., 39 N. E. 154, 139 Ind. 682.

4. Sufficiency of Blocking.

[a] (N. Y. Supp. 1894) Where a railroad employé was injured by catching his foot between two rails, where the blocking had come out, the company is not liable, unless it had actual notice that the blocking was out, or unless the blocking had been out long enough to constitute constructive notice. —Haskins v. Railroad Co., 29 N. Y. Supp. 274, 79 Hun, 159.

5. Contributory Negligence.

[a] (Me. Sup. 1899) A brakeman, having occasion to work on the trains of his employer while passing over another railroad, just constructed, cannot rightfully assume that the frogs and guard rails of the new railroad are filled or blocked, as required by St. 1889, c. 216, and hence dismiss all thought of them from his mind.—Gillin v. Railroad Co., 44 Atl. 361, 93 Me. 80.

[b] (Me. Sup. 1899) For a brakeman, knowing the frogs and switches are not blocked, to move over them while coupling and uncoupling cars, even in

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moving trains, without taking any thought of the frogs and guard rails, or as to where he may be stepping, is negligence on his part contributing to the catching his foot in them.—Gillin v. Railroad Co., 44 Atl. 361, 93 Me. 80.

[c] (Mo. Sup. 1891) It is not contributory negligence as a matter of law for a servant to continue in employment after knowledge of an unblocked switch.—Hamilton v. Mining Co., 18 S. W. 977, 108 Mo. 364.

[d] (Ohio C. C. 1894) Where the manifest weight of the evidence, in an action against a railroad for damages for wrongfully causing the death of one of its employés, showed that the injury occurred where there were switches or frogs, at a point where the decedent had no duties to perform, and by his thoughtlessly stepping one foot between the tracks immediately in front of a moving engine, whose bell was ringing, no recovery can be had. —Railway Co. v. Eagan, 18 Ohio Cir. Ct. R. 886, 4 O. C. D. 20.

6. Assumption of Risk.

[a] (U. S. Sup., Utah, 1894) An experienced railroad employé, familiar with a certain freight yard, and knowing that unblocked frogs are in use there, assumes the risk incident thereto, and where the evidence shows that, in attempting to make a coupling, he put his foot in a frog and was warned of the danger thereof, but persisted until his foot was caught, the court should instruct the jury to return a verdict for the defendant.—Southern Pac. Co. v. Seley, 14 Sup. Ct. 530, 152 U. S. 145, 38 L. Ed. 391, reversing Seley v. Railway Co. (1890) 23 Pac. 751, 6 Utah, 319.

[b] (U. S. C. C. A., Ohio, 1899) In the absence of statutory provision, a switchman employed in the yards of a railroad company assumes the risk incident to unblocked switches and guard rails, where, in general, there are no blocks used in such yards, and the servant has been employed therein for such a length of time that in the exercise of ordinary observation he must have known such fact.—Narramore v. Railway Co., 37 C. C. A. 499, 96 Fed. 298, 48 L. R. A. 68.

[c] (Ark. Sup. 1891) When an experienced brakeman enters the service of a railroad company, knowing that its frogs are not blocked, he assumes the increased risk incident thereto.—Railway Co. v. Davis, 15 S. W. 895, 54 Ark. 389.

[d] (Ill. App. 1885) Where deceased had been in the employ of defendant for a year preceding the accident, and for two months in the yard where the accident occurred, he will be deemed to have had knowledge of the danger and to have assumed the risk.—Railroad Co. v. Smith, 18 Ill. App. 119.

[e] (Ind. Sup. 1881) In an action for injuries to a brakeman by having his foot caught in an unblocked frog, it appeared that the switches were in the same condition during all the time that plaintiff was in defendant's employ, that they were of the same kind as those used on other railroads, that the frogs could be plainly seen, and that plaintiff could have acquired knowledge of their condition. *Held*, that plaintiff had assumed the risk.—Railway Co. v. McCormick, 74 Ind. 440.

[f] (Ind. Sup. 1894) Where none of the frogs at any of the switches of a railroad company are blocked, a brakeman, by continuing in employment, assumes the increased risk incident thereto.—Sheets v. Railway Co., 39 N. E. 154, 139 Ind. 682.

[g] (Ind. Sup. 1898) A railroad company blocked the space between switches and guard rails, except at street crossings. There were about 50 of these, all unblocked. A brakeman's foot was caught in an open space while attempting a coupling. The space was in the same condition when the brakeman entered on his employment, and since then he had passed it once a day, except Sundays, for over a month. *Held*, that he had assumed the extra risk incident to the space being left open.—Railroad Co. v. Ray, 51 N. E. 920, 152 Ind. 392.

[h] (Iowa Sup. 1884) Where, in an action for the death of an employé, it appeared that deceased had been in the employ of defendant for six weeks on the track where the accident occurred, he will be presumed to have had knowledge of the danger and to have assumed the risk.—Mayes v. Railway Co., 19 N. W. 680, 63 Iowa, 562.

[i] (Iowa Sup. 1898) Where a brakeman has worked for a number of years around a certain switch, which is dangerous, because so constructed as to be

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likely to catch the foot of one walking over it, he is negligent in attempting to uncouple moving cars while passing over such switch, and cannot recover for an injury caused thereby.—Quinn v. Railway Co., 77 N. W. 464, 107 Iowa, 710.

[j] (Kan. Sup. 1887) Where, in an action for the death of a brakeman resulting from a failure to have the switch and the guard rails blocked, it appeared that deceased had been employed in the yard where the accident occurred for about 2½ months prior to the accident, that the track was in the same condition as when it was constructed, and that it was constructed like those of other roads, deceased must be deemed to have had knowledge of the danger and to have assumed the risk.—Rush v. Railway Co., 12 Pac. 582, 36 Kan. 129.

[k] (Mass. Sup. 1888) Where plaintiff enters into employment, knowing that frogs are not protected, he assumes the risk.—Wood v. Locke, 18 N. E. 578, 147 Mass. 604.

[l] (Mich. Sup. 1890) Notwithstanding Pub. Acts 1883, p. 191, requiring all railroad companies to fill or block the frogs, switches, and guard rails, there can be no recovery for the death of a brakeman who, while voluntarily attempting to uncouple moving cars, gets his foot caught in an unblocked "split switch," when it appears that he had been several years in the employ of the company, was familiar with the switches and track where the accident occurred, had been warned by the written rules of the company, which he had read, not to enter between the cars in motion to couple or uncouple them, and had signed an acknowledgment, when he became brakeman, that he knew the duties were dangerous, and that he had read the rules by which he would be governed.—Grand v. Railroad Co., 47 N. W. 837, 83 Mich. 564, 11 L. R. A. 402.

[m] (N. Y. App. 1888) Where a switchman had for a long time been employed in a railroad yard, and knew the shape and purpose of a "frog," and knew that it was unblocked, it was error to submit to the jury, as a question of fact, whether he was charged with notice of the difficulty of removing his foot from the converging rails, and of the danger resulting from having his foot caught therein.—Appel v. Railway Co., 19 N. E. 93, 111 N. Y. 550.

[n] (N. Y. Sup. 1893) Plaintiff's intestate, a brakeman in defendant railroad company's employ, was killed by an engine by reason of his foot being caught in an unblocked frog. He had been in defendant's employ for several years, and knew that the larger portion of the frogs on defendant's tracks were generally provided with blocks, had been employed around the frog from which the accident occurred for over an hour, and with slight vigilance could have seen that it was not blocked. *Held*, in the absence of evidence that blocks were in general use on defendant's tracks or on those of other roads, that the failure of defendant to provide a block for the frog at which the accident occurred was not negligence, and that intestate must be held to have assumed the risk incident to the use of the frog.—Spencer v. Railroad Co., 22 N. Y. Supp. 100, 67 Hun, 196.

[o] (N. Y. Sup. 1893) A brakeman, who has been more than a year in the employ of a railroad company, assumes the risk incident to the fact that some of the guard rails in the company's switch yards are not blocked, so as to prevent an employé's foot from being caught between the guard rail and the main rail; and the company is not liable for his death, caused by failure to block such guard rails.—McNeil v. Railroad Co., 24 N. Y. Supp. 616, 71 Hun, 24, following (1888) Appel v. Railroad Co., 19 N. E. 93, 111 N. Y. 550.

[p] (Va. Sup. 1891) A railroad company is not liable for the death of an employé, caused by his foot being caught in an open frog, if it is of a standard sort, though it is the only frog in the yard not blocked, if the employé has been working over it for a long time, and had an opportunity to become familiar with its character.—Railroad Co. v. Risdon's Adm'r, 12 S. E. 786, 87 Va. 335.

[q] (Wis. Sup. 1897) A railroad employé working in a yard does not assume any risk arising from the defective condition or insufficient blocking of a guard rail.—Curtis v. Railroad Co., 70 N. W. 665, 95 Wis. 460.

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7. Evidence.

[a] (U. S. C. C., Ohio, 1895) Plaintiff sued a railway company for injuries caused by catching his foot in a guard rail. A statute made it obligatory on the railroad company to block its guard rails, so as to prevent the feet of its employés from being caught therein. Defendant claimed that a block which would have prevented the injury would have been inconsistent with the safe running of its trains, and so could not be required. *Held*, that evidence that after the accident a sufficient block was placed in the guard rail without endangering the trains was admissible to show that such a block could be used with safety.—Railroad Co. v. Van Horne, 69 Fed. 139.

[b] (Neb. Sup. 1888) In an action by an administratrix against a railroad company for damages for the death of her husband, a brakeman, the petition alleged that in constructing its railroad the defendant negligently failed to block its switches and frogs, by means of which deceased, in coupling cars, stepped between the rails of a switch and became fastened there, by reason of which he was run over by the cars and killed. *Held*, that the plaintiff could not recover without evidence that unprotected frogs and switches are inherently unsafe and dangerous when prudently and carefully worked and managed, and that blocking them materially lessens the danger of their use and management, and that such was generally recognized by those engaged in the construction and operation of railroads in the country or vicinity by the adoption and use of such improvement, or of evidence equivalent.—Railway Co. v. Lewis, 40 N. W. 401, 24 Neb. 848, 2 L. R. A. 67.

[c] (Neb. Sup. 1888) The construction and operation of a railroad without blocking its frogs and switches is not negligence per se, of which a court will take judicial notice upon proof of the fact of such construction and operation, and failure to block the frogs and switches only.—Railway Co. v. Lewis, 40 N. W. 401, 24 Neb. 848, 2 L. R. A. 67.

8. Questions for Jury.

[a] (Iowa Sup. 1887) In an action against a railroad company for the death of a brakeman in its employ, occasioned by his foot being caught in the space between the main and guard rails of the track, there was no evidence tending to show that the block in such space was improperly placed, or so placed as to be dangerous to employés; but the evidence did tend to show that the block was worn, and a portion of it split off, caused by the operation of the road. *Held* error to submit to the jury the question whether or not the block was so placed as to be dangerous to brakemen coupling or uncoupling cars in the exercise of ordinary care.—Griffith v. Railway Co., 34 N. W. 609, 72 Iowa, 645.

[b] (Minn. Sup. 1885) Whether it was the custom of defendant to leave frogs unblocked, so that its employés might be presumed to know that such was the custom, and by continuing in the employment to have assumed the risk, is a question for the jury.—Sherman v. Railway Co., 25 N. W. 593, 34 Minn. 259.

[c] (Mo. Sup. 1891) Whether or not a coal company, operating a spur railroad and switching tracks at its coal mines, was negligent in failing to block the rails, is a question for the jury.—Hamilton v. Mining Co., 18 S. W. 977, 108 Mo. 364.

(107 Fed. 1.)

KIRTLEY v. HOLMES.

(Circuit Court of Appeals, Sixth Circuit. February 12, 1901.)

No. 837.

1. CORPORATIONS—CONSTITUTIONAL LIABILITY OF STOCKHOLDERS—ENFORCEMENT IN OTHER JURISDICTIONS.

Under Const. Ohio, art. 13, § 3, providing that "dues from corporations shall be secured by such individual liability of the stockholders, and other means, as may be prescribed by law; but in all cases each stockholder shall be liable over and above the stock by him or her owned, and

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any amount unpaid thereon, to a further sum at least equal in amount to such stock,"—a contractual liability exists upon the part of every stockholder in an Ohio corporation to its creditors, in case of its insolvency, at least equal to the amount of his stock, which may be enforced in the federal courts against a stockholder domiciled in another jurisdiction, where the evidence in the case shows the insolvency of the corporation, that its indebtedness exceeds the stockholder's liability, and that assessments have been made by a court of Ohio, under its statutes, against domestic stockholders, to the full amount of their liability, so as to make it fully appear that the foreign stockholder will not be unjustly discriminated against.

2. SAME—SUITS BY RECEIVER.

Rev. St. Ohio, §§ 3258–3260, provide, in accordance with the provisions of the state constitution, that stockholders in corporations shall be individually liable to creditors in an amount equal to their stock; that such liability shall be enforced in an action in behalf of all creditors and against all stockholders, in which the court shall determine the amount payable by each person liable on all the indebtedness of the corporation, and shall render judgment therefor against all stockholders served. The supreme court of the state has held such suit to be equitable in its nature, and one in which it is proper for the court, under the statutes of the state, to appoint a receiver to collect the amounts for which judgment has been therein rendered. *Held*, that it was also within the power of such court to authorize its receiver to bring suits against stockholders domiciled in other jurisdictions, and that a federal court in another jurisdiction should, on the principle of comity, recognize his right to maintain an action therein in behalf of all creditors to enforce the liability of a stockholder domiciled within its jurisdiction to an amount proportionate to that which domestic stockholders have been required to pay.

3. FEDERAL COURTS—JURISDICTION—SUIT TO SUBJECT LANDS OF DECEDENT.

Where the statutes of a state permit a creditor to follow the lands of a decedent in the hands of his heirs, or when conveyed to others than bona fide purchasers for value, and it is shown that there are no debts of the estate other than the one sued on, and that it has no property except lands which have been conveyed by the heirs to the widow of the decedent without consideration, a federal court may entertain a suit in equity by a creditor to establish his claim against the estate, and enforce the same against such lands, subject to such rights of dower or homestead as are given the widow therein by the state statutes.

Appeal from the Circuit Court of the United States for the District of Kentucky.

This case originated in the attempt of John R. Holmes, a receiver appointed for the purpose of collecting the stockholders' liability of the Commercial Bank of Cincinnati, an insolvent corporation, to enforce the liability alleged to have been incurred by one John M. Kirtley as a stockholder in said bank. It appears that on the 27th day of March, 1895, the Commercial Bank made an assignment for the benefit of its creditors under the laws of the state of Ohio. On the day following, one Albert Berger filed his petition in the court of common pleas of Hamilton county, in said state, in behalf of himself and other creditors of said bank, against the stockholders, for the purpose of recovering the additional stockholders' liability under the Ohio constitution and statutes. On reference to a master, an accounting was taken of the amount of stock held by stockholders, the amount of claims of creditors, and the amount due each. On the 24th of April, 1896, a report was filed by the referee setting forth the names of the stockholders, the number of shares held by each, the names of creditors, and the amount of claims held by each. John M. Kirtley, it was alleged, was the owner of 120 shares of said stock, of the par value of $6,000. He was an original party to the suit, served with process, but having died in February, 1896, at his domicile in Covington, Kenton county, Ky., a conditional order of revivor was issued in the case on the 10th day of April, 1896, finding that Elizabeth M. Kirtley and Jerry H.

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Kirtley had been appointed, respectively, administratrix and administrator of said estate; and it was ordered that the action be revived as against said representatives by publication, and afterwards, the publication having been made, the court undertook to order the cause revived in the name of said representatives. Afterwards, on the 6th day of July, 1896, a judgment was entered on the report of the referee, finding the insolvency of the corporation; also the claims of creditors, amounting at the time of the failure to $840,388.38, from which was to be deducted the proceeds of certain collateral security, leaving $632,774.45 due the general creditors of the bank. The court found the assets of the bank, other than those pledged as collateral security, to be sufficient to pay not to exceed 50 per cent. of the indebtedness, and that not less than $381,104.63 would remain unpaid after the application of all the assets of the bank to the payment of its liabilities. The court thereupon found that it would be necessary to levy an assessment upon the stockholders of said corporation to pay said indebtedness. Further, that there were 6,560 shares, of the par value of $50 each, outstanding at the time of the failure of the bank, representing $328,000; that, of these shares, 665 were held by persons not within the jurisdiction of the court, and 1,095 shares by persons insolvent, leaving 4,800 shares held by persons who were solvent and within the jurisdiction of the court, amounting to $240,000. And the court found that the assessment to be levied upon each stockholder should be equal to the par value of the shares of stock held by each, and that the proceeds arising from such assessment would be insufficient to pay the balance due upon the uncontested claims against said bank, and much less than enough to pay the claims allowed by the court. An assessment was made, and judgment rendered accordingly. Among other stockholders, the court undertook to adjudge that Elizabeth M. Kirtley and Jerry H. Kirtley, as administratrix and administrator, respectively, of the estate of John M. Kirtley, deceased, should be assessed in the sum of $6,457; and the parties held liable were ordered to pay their several assessments within 30 days to the receiver, and this further order was made: "Upon motion of the plaintiff and the cross petitioners herein, the court doth hereby appoint John R. Holmes receiver herein, and does authorize and direct said John R. Holmes, as such receiver, to collect and receive from the defendants the amounts assessed against them, and to take all steps that may be necessary for that purpose, including the employment of counsel, the commencement of actions in this or any other court, whenever it may be necessary to make collections, as well from the defendants herein as from those who are not within the jurisdiction of the court, or from those whose property has been attached herein. Said John R. Holmes, receiver, before entering upon his duties as such receiver, shall give bond, conditioned according to law, in the sum of $100,000, and otherwise qualify himself by taking the oath of office." And said receiver was ordered to pay the costs of the action, the fee of the master, and to bring the remainder of the moneys coming into his hands into court for final distribution.

John R. Holmes, the said receiver, thereupon gave bond and proceeded to execute the duties of his office, and, among other things, instituted the present action in the circuit court of the United States for the district of Kentucky. In the bill allegations were made of the facts above stated as to the assessment by the order of the court of common pleas of Hamilton county, Ohio, with a statement of the proceedings leading up to the same. The bill also contained allegations as to the amount of outstanding indebtedness, and the consequent necessity of assessing each and every stockholder for the full amount of his stock. It also alleged the ownership of said 120 shares by John M. Kirtley during his lifetime, his death and appointment of his said representatives, proof of the claim, and refusal of the administratrix to allow and pay the same. It also alleged that said Kirtley was the owner of certain real estate in the county of Kenton, city of Covington, and state of Kentucky; that the personal estate of said Kirtley was insufficient to pay his debts; that the real estate of said Kirtley had been transferred by his children, who were defendants in the bill, to their mother, Elizabeth M. Kirtley; and that said transfer was not for a valuable consideration, and was fraudulent as against the creditors of said John M. Kirtley.

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Also contained other allegations, not necessary to recite in this connection, and sought to subject said real estate to the payment of the claim of said receiver. Issues were joined by answers filed by the administratrix and the heirs of said John M. Kirtley, deceased. Upon the trial certain stipulations were filed in the court, to wit: "It is stipulated between the counsel in this case: That an action was commenced in the court of common pleas of Hamilton county, state of Ohio, by Albert Berger, on behalf of himself and other creditors of the Commercial Bank of Cincinnati, Ohio, against the said bank and all of the stockholders thereof within the jurisdiction of said court, to assess the additional statutory liability upon said stockholders under the constitution and statutes of the state of Ohio. That John M. Kirtley, a resident of the state of Kentucky, was originally made a party defendant to the said suit and served with process, and filed his answer therein. That said John M. Kirtley died on the 23d day of February, 1896, domiciled in the state of Kentucky, and between that date and the 16th day of June, 1896, an entry was made in said cause suggesting the death of said John M. Kirtley, and substituting the defendant Elizabeth M. Kirtley, administratrix of his estate, who had been appointed administratrix by the proper court in Kenton county, state of Kentucky. That the said Elizabeth M. Kirtley, administratrix, was never served with summons or other process in said case; but an advertisement was published in a newspaper within said Hamilton county, state of Ohio, under and in accordance with the statutes of said state, serving her, or purporting to serve her, by what is known as 'constructive process,' and that was the only means adopted to make her a party defendant to the suit. And said Elizabeth M. Kirtley, administratrix, never appeared in said cause, and was never a stockholder in said Commercial Bank in any capacity otherwise than as the title to the stock alleged to have been held by John M. Kirtley may have passed to her by law as his administratrix, and thereafter, to wit, on the 6th day of July, 1896, the decree in said cause, a copy of which is attached to her answer herein, was entered on the journals of said court, and that is the same decree that is mentioned in the bill of complaint in said cause. It is hereby stipulated and agreed between counsel for the respective parties to this cause to be a fact that there are no liabilities or claims against the estate of John M. Kirtley, deceased, other than that set forth in the bill herein, and that there is no real or personal property now belonging to the estate of said decedent, other than that described in said bill."

Upon trial the court found in favor of the receiver, ordering the real estate in question to be sold, to reverse which decree this appeal is prosecuted.

C. B. Matthews, for appellants.

H. D. Peck and S. D. Rouse, for appellee.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

DAY, Circuit Judge, after stating the foregoing facts, delivered the opinion of the court.

The principal question in the case is as to the right to enforce the so-called "stockholders' liability" arising under the constitution and laws of the state of Ohio in a court of the United States in a state other than the one in which the liability arose. The stockholders' liability in the state of Ohio is created primarily by the constitution of the state. Article 13, § 3, of the constitution of Ohio provides:

"Dues from corporations shall be secured, by such individual liability of the stockholders, and other means, as may be prescribed by law; but, in all cases, each stockholder shall be liable over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum, at least equal in amount to such stock."

For the purpose of giving effect to this constitutional provision the legislature of Ohio has passed certain statutes. Section 3258, Rev. St. Ohio, provides:

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"The stockholders of a corporation which may be hereafter formed, and such stockholders as are now liable under former statutes, shall be deemed and held liable, in addition to their stock, in an amount equal to the stock by them subscribed, or otherwise acquired, to the creditors of the corporation, to secure the payment of the debts and liabilities of the corporation."

Section 3259 provides:

"The term 'stockholders' as used in the preceding section shall apply not only to such persons as appear by the books of the corporation to be such, but to any equitable owner of stock, although the stock appears on the books in the name of another."

As to the manner of enforcing such liability, it is provided in section 3260:

"A stockholder or creditor may enforce such liability by action jointly against all the holders or owners of stock, which action shall be for the benefit of all the creditors of the corporation, and against all persons liable as stockholders; and in such action there shall be found and determined the amount payable by each person liable as stockholder on all the indebtedness of the corporation, in which adjudication no costs shall be taxed to nor collected of any stockholder to an amount which together with the amount to be paid on said indebtedness, will exceed the amount of the stock on which he is liable, provided, that in any such action the plaintiff may file in the court a sworn statement that a stockholder or stockholders or the legal representatives of a deceased stockholder have not been summoned, giving their residence if known, and that it is impracticable to secure service of summons upon such stockholders or such legal representatives of a stockholder, and remitting from the claims of the plaintiff or of other creditors consenting, so much as may be found payable by such stockholders not served with summons except those who may be insolvent or non-resident of the state, and judgment shall be rendered against the stockholders who have been served with summons, for the pro rata amount for which they would be liable if all solvent stockholders resident of the state were served with summons; and when a creditor has prosecuted against a corporation an action of [at] law begun before any action to enforce the stockholders' liability, and has recovered final judgment only after such an action to enforce the stockholders' liability has been prosecuted to a final decree in the court in which the action was commenced, such judgment creditor may bring a like action against the stockholders of the corporation to enforce such judgment at any time within four years after the recovery of his said judgment, but the stockholders shall not be liable for any amount in excess of that provided in section thirty-two hundred and fifty-eight."

Before the passage of section 3260 the supreme court of Ohio, passing upon the constitution and a statute enacted in practically the terms of the constitution, without providing the method of enforcing the liability more specifically, held that the stockholders' liability created by the constitution and laws of Ohio is not a primary resource or fund for the payment of the debts of the corporation, but is collateral and conditional to the principal obligation which rests on the corporation, and is to be resorted to by the creditors only in case of the insolvency of the corporation, or where payment cannot be enforced against it by ordinary process; that an action to enforce such liability must be brought for the benefit of all the creditors against all the stockholders; that no creditor can acquire priority by undertaking to institute a separate suit for his own benefit; that the provision inured to the benefit of all the creditors, and the remedy must be sought for the common benefit of all. Wright v. McCormack, 17 Ohio St. 87; Umsted v. Buskirk, 17 Ohio St. 114. The right of action arising under the constitution of the state of Ohio

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and the statutes passed in pursuance thereof, while it may be regarded in some sense as a statutory action, does not wholly arise therefrom, but rather from the constitutional provision for the benefit of creditors of corporations, declaring that stockholders shall be liable, at least, in an amount equal to the stock held by them. This right created by the constitution could be enforced in the absence of a statute. It is a right arising from the contract which every stockholder makes, upon becoming such, with the creditors of the corporation. Under such a constitution, and laws passed in pursuance thereof, creditors have a right to look not only to the liability of the corporation, but to the personal liability of the stockholders, which is incurred, no less than the corporate obligation, whenever any debt is created. It is in fact a liability upon contract. This was distinctly ruled in Brown v. Hitchcock, 36 Ohio St. 667. The supreme court of the United States has taken the same view of the nature of the liability under such constitutions and statutes. Whitman v. Bank, 176 U. S. 559, 20 Sup. Ct. 477, 44 L. Ed. 587,—a case arising under the constitution of Kansas, providing that:

"Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder, and such other means as shall be provided by law."

Under the statutes passed in Kansas a right of action is given in favor of any creditor against a stockholder, and not by one common action by all creditors against all stockholders, as is the case in Ohio. Nevertheless the nature of the liability is the same as under the Ohio constitution and laws, and is no less contractual in its nature. Such is also the holding of the supreme court in Flash v. Conn, 109 U. S. 371, 3 Sup. Ct. 263, 27 L. Ed. 966; of the court of appeals in New York in the case of Howarth v. Angle, 162 N. Y. 179, 56 N. E. 489, 47 L. R. A. 725; and of the supreme court of Massachusetts in the late case of Howarth v. Lombard, 175 Mass. 570, 56 N. E. 888. In Hawthorne v. Calef, 2 Wall. 10, 17 L. Ed. 776, it was decided that the obligation was contractual in the sense that it is of constitutional right, and no subsequent statute can impair the obligation of the contract. Numerous well-considered cases to the same effect are collected in the opinion of Justice Knowlton in Howarth v. Lombard, supra. When the obligation is created by an Ohio corporation, a creditor has the right to rely upon the obligation imposed by the constitution and laws of the state upon stockholders to answer to him in the event of a failure of the corporation, by reason of its insolvency, to meet its obligations, to an amount equal to the capital stock of the corporation outstanding. A stockholder, in like manner, must be held to have taken his stock in view of the obligation attaching thereto to answer to the creditors in an amount equal to his stock. Such being the nature of the liability, it is well settled that such obligation will be enforced, wherever practicable, in a federal court of competent jurisdiction. Dennick v. Railroad Co., 103 U. S. 11, 26 L. Ed. 439; Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123; Whitman v. Bank, 176 U. S. 559, 20 Sup. Ct. 477, 44 L. Ed. 587. The objection usually made to the enforcement of such obligations beyond the limits of the state

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creating them is either that the statutes are penal in their nature, or that an attempt to enforce them upon principles of comity in other states would be to hold a citizen of the foreign jurisdiction to a greater obligation and impose upon him greater burdens than those which rest upon citizens of the state creating the liability. We have already undertaken to show that the obligation is contractual, and not penal, in its nature. Is the remedy afforded in the courts of Ohio of such a peculiarly local nature that it would be inequitable to undertake to enforce it in another jurisdiction? Will such enforcement work a hardship and inflict an additional burden upon foreign stockholders? It may be admitted that, if such will be the effect of undertaking to enforce the liability, a court of another jurisdiction will withhold relief. Bank v. Francklyn, 120 U. S. 747, 7 Sup. Ct. 757, 30 L. Ed. 825. In that case Mr. Justice Gray, delivering the opinion of the court, said:

"In all the diversity of opinion in the courts of the different states upon the question how far liability imposed upon stockholders in a corporation by the law of the state which creates it can be pursued in a court held beyond the limits of that state, no case has been found in which such a liability has been enforced by any court without a compliance with the conditions applicable to it under the legislative acts and judicial decisions of the state which creates the corporation and imposes the liability. To hold that it could be enforced without such compliance would be to subject stockholders residing out of the state to a greater burden than domestic stockholders."

In this case it must be borne in mind that no attempt is being made to enforce the liability in the state of Kentucky in a different or other manner than is being done in the original decree against stockholders resident of the state of Ohio. No attempt is being made to enforce the liability on a different principle of assessment than was adopted in the original case. In section 3260 of the Revised Statutes of Ohio an action is provided which is to be brought within the state for the benefit of all creditors and against all stockholders, and in that action it is expressly provided that the amount shall be found and determined payable by each person liable as a stockholder on account of all the indebtedness of the corporation. It is true that this section contains a provision that an assessment may be made upon the basis of the liability of all solvent stockholders resident of the state in the same manner as though all such stockholders had been served with summons. Of course, the Ohio courts have the power to enforce the assessment only upon such stockholders as are brought within their jurisdiction. It would be futile to undertake to collect an assessment upon those beyond the jurisdiction. They therefore enforce the contractual obligation of the stockholders to the extent which is practicable, having in view the liability of those within the jurisdiction of the court. The Ohio statute has not, however, undertaken to absolve other stockholders from their contractual obligation. That still exists. It is a right of the creditor. In consideration of the liability of the stockholder, foreign as well as domestic, credit was extended to the corporation. Upon every principle of equity and justice this liability should be enforced, if it can be without violating the principles of law, or unjustly discriminating against citizens of another jurisdiction.

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In the present case we are not required to determine how far the findings of the Ohio court as to the insolvency of the corporation, the extent of its indebtedness, and the amount of the assessment are binding upon foreign stockholders. This subject has been a good deal discussed in some of the cases, but in the present case the decree rests not only upon the findings of the Ohio court as to the matters stated, but it is alleged and proved that the corporation was insolvent; that an assessment was required upon each and all of the stockholders in an amount equal to the stock held by them, and the decree was rendered upon proof independent of the proceedings in the Ohio court. The case actually under consideration comes to this: Can the contractual liability of a stockholder in an Ohio corporation, domiciled in a foreign jurisdiction, be enforced, where the proofs show an assessment in the state of the creation of the corporation upon domestic stockholders to the full amount of the stockholders' liability, and the testimony discloses the insolvency of the corporation and indebtedness in excess of the stockholders' liability, and an assessment is sought of exactly the same character as was enforced in the original case? We think, in the light of principle and authority, this question must be answered in the affirmative. We find the obligation to be one arising upon contract, and its enforcement upon principles of comity, at least, in cases like the one under consideration, to work no injustice upon citizens of a foreign jurisdiction.

2. A further question made in the case is: Can the receiver bring the action? We think the order is broad enough, assuming that the court had power to make it, to justify the prosecution of suits in another jurisdiction. This seems to have been one of the purposes for which the receiver was appointed, and it would be a very narrow construction to hold that he was appointed only to collect the judgments rendered in the Ohio court. As the Ohio statute stood at the time the present cause of action accrued, and until the act of 1900 amending section 3260 and passing certain supplementary sections, no specific authority is found in the Ohio statute for the appointment of a receiver for the express purpose of bringing an action of this character. Nevertheless we think such authority existed. In the case of Zieverink v. Kemper, 50 Ohio St. 208, 34 N. E. 250, it was held that a receiver may, by authority of the court appointing him, prosecute actions in his own name, as such receiver, to enforce payment of judgments rendered for such statutory liability. In speaking of the right to appoint a receiver in such cases, Judge Burkett, delivering the opinion, says:

"We think there is abundant authority in the statutes for the appointment of a receiver in an action to collect the statutory liability of stockholders, and that such is the usual and better practice. But the judgment against the several stockholders must be rendered in the original action brought by a creditor or stockholder as provided in section 3260, Rev. St. Such an action is equitable in its nature, and the statutory liability of the stockholders is a trust fund inuring to the equal benefit of all the creditors of the corporation; and this fund is made up from different amounts of money, to be collected from many different stockholders, and to be distributed among many creditors, and no one creditor is more interested in the collection than another. As no preference can be obtained by diligence, no one would be spe-

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cially interested in prosecuting suits for the equal benefit of himself and others; and in such cases it is the usage of equity to appoint a receiver to collect and distribute the fund, under the order of the court, for the equal benefit of all the creditors. The fact that the right of action is given by statute makes it none the less an equitable action, and being an equitable action in its nature, requiring the service of a receiver, it is one of those in which receivers have heretofore been appointed by the usages of equity, as provided in section 5587 of the Revised Statutes. This case also comes within the letter as well as the spirit of the third subdivision of said section 5587, which provides that a receiver may be appointed 'after judgment to carry the judgment into effect.' "

It is true that in the case just quoted it is said that the judgment against the stockholders must be rendered in the original action. Nevertheless, the right being of an equitable nature, and prosecuted for the benefit of all the creditors, it is recognized that a receiver may be appointed if the case be one where receivers are appointed by the usages of equity, as is specifically provided by section 5587 of the Ohio Revised Statutes. The action being for the benefit of all the creditors, and having been instituted upon that theory in the Ohio court, which is to ascertain the amount to be assessed against stockholders, and the creditors entitled to the benefit thereof, we think it is in harmony with the usages of equity to appoint a receiver who shall, under the direction of the court, bring an action in order to bring into the fund sums arising from the liability of stockholders beyond the jurisdiction of the court. The cause of action exists in favor of all creditors. It may be impracticable to unite all in the bringing of the action. A court of equity, in the exercise of its power to appoint a receiver, may well appoint one for the purpose of reaching such outstanding liabilities. The right of such a receiver appointed in another jurisdiction to maintain an action has been recognized in many well-considered cases. A receiver's right to sue is recognized upon principles of comity, where no injustice would be done to the citizens of the local jurisdiction, or his recognition conflict with public policy. Howarth v. Angle, 162 N. Y. 179, 56 N. E. 489, 47 L. R. A. 725; Same v. Lombard, 175 Mass. 570, 56 N. E. 888; Howarth v. Ellwanger (C. C.) 86 Fed. 54; and Hale v. Hardon, 37 C. C. A. 240, 95 Fed. 747.

3. As to the objection to the manner of action in this case, which undertakes by a bill in equity to subject the lands of which Kirtley was seised at the time of his death to the payment of this claim, we think the bill can be maintained under sections 2087, 2089, Ky. St., cited in the opinion of Judge Barr in passing upon the demurrer in the court below. These sections seem ample to permit a creditor to follow the lands of a decedent in the hands of the heirs, or when conveyed to others than bona fide purchasers for value. The circuit court found (and we think the testimony fully warranted the conclusion) that the conveyance to Mrs. Kirtley was not upon a valuable consideration, and worked a constructive fraud upon the creditors of the decedent. Furthermore, we think a bill of this character may be maintained in the courts of the United States to subject this interest of the decedent to the payment of debts, in view of the stipulation in the record that there are no liabilities or claims against the estate of John M. Kirtley, deceased, other than that

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set forth in the bill herein, and that there is no real or personal property now belonging to the estate of said decedent other than that described in said bill. In such a case, we think there is no interference with the administration of the probate law of Kentucky in obtaining this asset and subjecting it to the only outstanding liability. Kennedy v. Creswell, 101 U. S. 641, 25 L. Ed. 1075.

The record discloses, however, that the court ordered the premises to be sold free of any dower interest of Elizabeth M. Kirtley. Assuming that the land still belongs to the estate of John M. Kirtley for the purpose of subjecting it to his debts, we are not aware of any principle which will permit Mrs. Kirtley to be deprived of such rights of dower or homestead as are given to her by the laws of Kentucky. The decree in that respect seems to be erroneous. So far as it undertakes to subject the premises to sale free from dower, the decree of the court below will be modified. In other respects it will be affirmed, and the cause remanded to the court below for further proceedings in accordance herewith.

(107 Fed. 10.)

CITY OF TOLEDO et al. v. WESTERN UNION TEL. CO.

(Circuit Court of Appeals, Sixth Circuit. March 5, 1901.)

No. 933.

1. TELEGRAPHS AND TELEPHONES—MAINTENANCE OF LINE—POST ROADS—CITY STREETS—CONTROL BY CITY.

Act Cong. July 24, 1866 (Rev. St. §§ 5263–5268), provides that any telegraph company organized under the laws of any state may construct and maintain telegraph lines over any portion of the public domain, and over and along any military or post road of the United States, provided that such lines shall be so constructed and maintained as not to interfere with travel. Act Cong. June 8, 1872 (Rev. St. § 3964), declares that all letter-carrier routes established in any city or town shall be post roads. *Held*, that an interstate telegraph company which had accepted the provisions of the act of 1866 was not entitled to erect and maintain its lines over the streets of a city without complying with the reasonable regulations of the city for the erection and maintenance of such lines, and without procuring a permit therefor from the city.[1]

2. SAME—DISTRICT TELEGRAPH SYSTEM.

Such act was strictly limited to the business of telegraph companies as such, and hence did not authorize a telegraph company accepting the act to use the streets of a city for the installation of a district telegraph system for the purpose of the collection and delivery of telegraph messages, and the maintenance of a messenger system, fitted with call boxes for watchman, fire, burglar, and police signals, and for the employment of messenger boys to carry messages and packages, run miscellaneous errands, distribute posters, etc., within the city.

Appeal from the Circuit Court of the United States for the Western Division of the Northern District of Ohio.

[1] Rights of telegraph and telephone companies to use of streets, see note to Southern Bell Telephone & Telegraph Co. v. City of Richmond, 44 C. C. A. 155.

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The Western Union Telegraph Company, complainant, a corporation under the laws of the state of New York, authorized to do a general telegraphic business throughout the United States, on June 17, 1867, accepted the terms of the act of congress of July 24, 1866 (Rev. St. U. S. §§ 5263–5268), the first section of which provides: "That any telegraph company now organized or which may hereafter be organized, under the laws of any state in this Union, shall have the right to construct, maintain and operate lines of telegraph, through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by act of congress, and over, under or across the navigable streams or waters of the United States: provided, that such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads. And any of said companies shall have the right to take and use from such public lands the necessary stone, timber and other materials for its posts, piers, stations and other needful uses in the construction, maintenance and operation of said lines of telegraph, and may pre-empt and use such portion of the unoccupied public lands subject to pre-emption through which its lines of telegraph may be located as may be necessary for its stations, not exceeding forty acres for each station; but such stations shall not be within fifteen miles of each other." Subsequently, by an act approved June 8, 1872 (Rev. St. U. S. § 3964), all letter-carrier routes established in any city or town for the collection and delivering of mail matter by carriers were declared by congress to be post roads. Soon after its acceptance of the terms of the act of congress of 1866, the complainant constructed its lines of telegraph in the city of Toledo, and has since, with full acquiescence of the city, occupied its streets and alleys with its poles and wires. It has conformed to the regulations of the city from time to time by putting its wires underground where required, and removing its poles from one district to another. For several years the Western Union Telegraph Company had its messages delivered and gathered by a local company, with which it failed to make a contract to continue such service, and at some time before the commencement of this suit several persons had agreed to form another such company, to be known as the "National District Telegraph Company," with which, when formed, the Western Union Telegraph Company had agreed to make a contract for the gathering and delivering of its messages in the city of Toledo. This company was never formed, and never acquired any rights in the streets of Toledo, although the persons who contemplated forming it had call boxes made and placed in some of the offices and buildings, and advertised for business under the representation that this company was connected with the Western Union Telegraph Company. Without obtaining a franchise, the persons contemplating forming the National District Telegraph Company applied to the complainant to be allowed to install its system on the poles and in the conduits of the complainant, which, on advice of counsel, was refused. The project of forming the National District Telegraph Company was then abandoned, and the complainant purchased the boxes which bore the name and advertisement of the National District Telegraph Company, and purposed completing the system by stringing wires on its poles and in its conduits, and carrying on the business of a district telegraph company for its own service and for the general public. For this purpose, without disclosing it, the complainant applied to the superintendent of fire-alarm telegraph and city civil engineer of defendant city for permits to set poles as required by the ordinance with which it had always complied. These permits were granted under the belief that the work was for the regular and accustomed business of the complainant; but when it was found that complainant was connecting wires with the call boxes which had been put in, and installing a complete district telegraph system, the defendant, under the impression that complainant was clandestinely doing this for the National District Telegraph Company, revoked the permits, and the complainant was notified that, if it desired to do any more new work, a separate permit should be applied for, stating exactly what was required. The common council of the city then passed a resolution stating that parties styling themselves the National

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District Telegraph Company had, without right or authority, erected poles and fixtures, and had strung wires in and over the streets, alleys, and public places in the city, which were a hindrance to the fire department, and a menace to the safety of the lives and property of citizens, and directing the chief of police, city civil engineer, and superintendent of fire-alarm telegraph to remove all such wires, fixtures, and poles erected or constructed by the National District Telegraph Company, or by any other individual, company, or corporation, without having first complied with the laws, ordinances, and regulations governing this class of work in the city of Toledo. Thereupon this bill was filed against the city and its officers, stating in the most general terms that the defendant city threatened to cut the wires, destroy the lines, and remove the poles of the complainant, and interrupt the working of its lines, ruin its business, and incapacitate it from discharging its duties to the general public and its agency to the federal government. An order to show cause why a preliminary injunction should not be granted was made, and a preliminary restraining order was issued. On the hearing, the defendant disclaiming every intention of interfering with the lines and property of the complainant used in its usual and ordinary business, and avowing that its purpose was only to arrest the installation of the plant of the National District Telegraph Company, the preliminary injunction was denied, and the temporary restraining order vacated. W. U. Tel. Co. v. City of Toledo, 103 Fed. 746. The complainant then filed a petition setting out frankly its purpose of installing a district telegraph system in the city of Toledo in connection with its business as now conducted, and stating for that purpose it had purchased the boxes with the National District Telegraph Company's name and advertisement imprinted upon them, and intended to connect the boxes already placed and others to be placed in complainant's office by the wires and construction which the defendant threatened to destroy; that the defendant had, since an order for a preliminary injunction had been denied, and the temporary restraining order set aside, cut the wires belonging to the complainant, and it again asked for a preliminary injunction against the defendant. After a hearing, an order was made reciting that the complainant proposed to establish and operate a local district telegraph system in the city of Toledo, through its own wires and apparatus, and restraining the defendant, until the further order of the court, from obstructing the complainant in installing the system on its poles and through its conduits, and from interfering with the complainant in carrying on and conducting a district telegraph system within the city of Toledo. From that order the defendant has appealed to this court.

C. K. Friedman, for appellant.

H. D. Estabrook and John W. Warrington, for appellee.

Before LURTON and SEVERENS, Circuit Judges, and WANTY, District Judge.

WANTY, District Judge, after making the foregoing statement, delivered the opinion of the court.

We assume for the purposes of this appeal that the complainant was rightfully occupying the streets, alleys, and conduits in the city of Toledo for the conduct of its ordinary and usual business. We also assume that the defendant had no intention of interfering with the complainant in such use, and that the resolution of the common council was directed against the installation of the district telegraph plant which was being put in, "whether," in the words of the resolution, "it belonged to the National District Telegraph Company or any other individual, company, or corporation, without having first complied with the laws, ordinances, and regulations governing this class of work in the city of Toledo." The broad claim is made by the complainant that by accepting the terms of the act

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of congress of 1866 it became an agency of the federal government, and as such has the right to occupy with its wires and poles the post roads of the United States, which include the streets and alleys of the city of Toledo, subject only to the limitation of not interfering with ordinary travel; that, as it was not necessary originally to obtain the consent of the municipality to occupy its streets, it is under no obligation to obtain permits to put in new construction and do the work under the direction of the city civil engineer and superintendent of fire-alarm telegraph. We think, however, in the use of these streets and alleys, although it had accepted the terms of the statute of 1866, the complainant was subject to the control of the municipality, and could not, in defiance of its reasonable regulations, erect poles and stretch wires without let or hindrance. It is necessary for its fire protection, and a proper knowledge of the obstructions in its streets, and the use to which its public places are being subjected, for the city to know, before any construction is put in, what is contemplated, and to have the work done under the supervision of its officers; and the complainant is no more exempt from such restrictions than any other corporation rightfully occupying the streets and alleys of the city. The complainant recognized its obligation to obtain permits in all of its conduit work and in its outside construction until the municipal authorities attempted to prevent the installation of a district telegraph plant, and it then for the first time claimed that it was an agency of the federal government, and was subject to no such restrictions. We think in taking that position it was mistaken, as there was no intention on the part of the federal government in permitting the complainant to use its post roads to dispossess the state and municipalities of the control of them, but the permission was given like any other franchise granted to a corporation, to be exercised in subordination to both public and private rights.

The claim that the acceptance of the terms of the act of congress of 1866 made the complainant an agency of the federal government, and exempt from state and municipal control, has been made by the complainant whenever state or municipal authorities have tried to subject it to the same burdens borne by other corporations doing business within the state or municipality, but without avail. When the state of Massachusetts passed an act taxing the Western Union Telegraph Company on account of the property owned and used by it within that state, it set up its acceptance of the terms of the act of 1866 making it an agency of the federal government, and claimed that it was, therefore, exempt from such taxation; that to tax it was equivalent to taxing a government bank, or any other government agency, and therefore beyond the power of the state. But it was held that the act of 1866 was only a permissive statute, and nothing in it implied an exemption from the ordinary burdens of taxation. W. U. Tel. Co. v. Massachusetts, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790. When the city of St. Louis, in the state of Missouri, imposed an annual charge for each pole erected in its streets by the complainant, the same claim was again made. In

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announcing the judgment of the supreme court of the United States, Justice Brewer used the following language, which is not inappropriate here, in view of the claim made in this case:

"It is a misconception, however, to suppose that the franchise or privilege granted by the act of 1866 carries with it the unrestricted right to appropriate the public property of a state. It is, like any other franchise, to be exercised in subordination to public as to private rights. While a grant from one government may supersede and abridge franchises and rights held at the will of its grantor, it cannot abridge any property rights of a public character created by the authority of another sovereignty. No one would suppose that a franchise from the federal government to a corporation, state or national, to construct interstate roads or lines of travel, transportation, or communication, would authorize it to enter upon the private property of an individual, and appropriate it without compensation. No matter how broad and comprehensive might be the terms in which the franchise was granted, it would be confessedly subordinate to the right of the individual not to be deprived of his property without just compensation. And the principle is the same when, under the grant of a franchise from the national government, a corporation assumes to enter upon property of a public nature belonging to a state. It would not be claimed, for instance, that under a franchise from congress to construct and operate an interstate railroad the grantee thereof could enter upon the state-house grounds of the state, and construct its depot there, without paying the value of the property thus appropriated. Although the state-house grounds be property devoted to public uses, it is property devoted to the public uses of the state, and property whose ownership and control are in the state; and it is not within the competency of the national government to dispossess the state of such control and use, or appropriate the same to its own benefit, or the benefit of any of its corporations or grantees, without suitable compensation to the state. This rule extends to streets and highways. They are the public property of the state. While for purposes of travel and common use they are open to the citizens of every state alike, and no state can, by its legislation, deprive the citizens of another state of such common use, yet when an appropriation of any part of this public property to an exclusive use is sought, whether by a citizen or corporation of the same or another state, or a corporation of the national government, it is within the competency of the state, representing the sovereignty of that local public, to exact for its benefit compensation for this exclusive appropriation. It matters not for what that exclusive appropriation is taken, whether for steam railroads or street railroads, telegraphs or telephones, the state may, if it chooses, exact from the party or corporation given such exclusive use pecuniary compensation to the general public for being deprived of the common use of the portion thus appropriated." City of St. Louis v. W. U. Tel. Co., 148 U. S. 100–102, 13 Sup. Ct. 488, 489, 37 L. Ed. 384.

We think the complainant should have made the usual applications for permits to string its wires, stating exactly what was required, in accordance with the regulations of the city, with which it had been accustomed to comply, and it had no right to construct its work in defiance of those requirements.

We are also of the opinion that the Western Union Telegraph Company had no right, under the privileges granted to it by the act of 1866, to install a district telegraph system in the city of Toledo, as that act only extended its privileges to the business of telegraph companies. A district telegraph business, as disclosed by this record, consists in securing the attendance of messenger boys to carry telegraph messages, run miscellaneous errands, carry packages, distribute posters, invoices, invitations, etc. The business also includes night watchman signals, fire and burglar alarms, and police calls.

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If the act of 1866 is construed to embrace a company formed for such service because it uses wires and appliances in use by a telegraph company, then it would not have been necessary for the proposed National District Telegraph Company to ask permission of complainant to install its proposed plant on its poles and in its conduits, because, by accepting the terms of the act of congress, it would itself have been entitled to all the privileges that the complainant derives from that act. It was conceded on the argument that such a corporation would not be entitled to the privileges conferred by the act, but complainant insists that the installation of the call boxes is necessary for gathering messages to be transmitted in order to meet modern competition, and that they are a necessary incident to its business, and therefore come within the privileges granted to it. It is claimed that the test is, are the boxes and wires put in for telegraphing? If they are, no matter in what business they are used, they come within the privileges granted. If this contention is correct, the complainant may, with the consent of the owner, run its wire into every store, shop, office, manufactory, and residence in the city. Instead of the limited number of wires used for the business of interstate commerce, the number would be limitless. Instead of the complainant being limited to transmitting messages by telegraph, it could become engaged in every known business. We do not assent to this view. We think the business of a district telegraph company does not come within the privileges granted by the act, and it cannot, as an incident in procuring messages to be sent, be privileged more than a telephone service, for the same purpose, to which it has been held by the supreme court the act has no application. City of Richmond v. Southern Bell Telephone & Telegraph Co., 174 U. S. 761, 19 Sup. Ct. 778, 43 L. Ed. 1162. It follows that the order for a preliminary injunction was improvidently made, and must be reversed.

(107 Fed. 15.)

UNITED STATES v. ALTMAN et al.

(Circuit Court of Appeals, Second Circuit. February 7, 1901.)

No. 60.

CUSTOMS DUTIES—WOMEN'S CORSETS—WEARING APPAREL MADE PARTLY OF LACE

Women's corsets made of cotton and other materials, trimmed around the upper border with cotton-lace edgings, whose relative value to the corsets is from 1 to 2 per cent., should be regarded as "wearing apparel * * * made wholly or in part of lace, or in imitation of lace," within Act 1897, par. 339, and classified for duty accordingly.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decision of the circuit court, Southern district of New York, reversing a decision of the board of general appraisers which sustained the action of the col-

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lector of the port of New York in the assessment for duty of certain merchandise imported under the tariff act of 1897.

D. Frank Lloyd, for appellant.
W. Wickham Smith, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The goods in question are women's corsets made of cotton and other materials, cotton chief value, trimmed around the upper border with cotton-lace edgings. The collector classified them for duty under paragraph 339, which reads:

"339. Laces, lace window curtains, tidies, pillow shams, bed sets, insertings, flouncings, and other lace articles; handkerchiefs, napkins, wearing apparel, and other articles, made wholly or in part of lace, or in imitation of lace; nets or nettings, veils and veilings, etamines, vitrages, neck rufflings, ruchings, tuckings, flutings, and quillings; embroideries and all trimmings, including braids, edgings, insertings, flouncings, galloons, gorings, and bands; wearing apparel, handkerchiefs, and other articles or fabrics embroidered in any manner by hand or machinery, whether with a letter, monogram, or otherwise; tamboured or appliquéed articles, fabrics or wearing apparel; hemstitched or tucked flouncings or skirtings, and articles made wholly or in part of rufflings, tuckings, or ruchings; all of the foregoing, composed wholly or in chief value of flax, cotton or other vegetable fiber, and not elsewhere specially provided for in this act, whether composed in part of India rubber, or otherwise, sixty per centum ad valorem: provided, that no wearing apparel or other article or textile fabric, when embroidered by hand or machinery, shall pay duty at a less rate than that imposed in any schedule of this act upon any embroideries of the materials of which such embroidery is composed."

The importers contended that the merchandise should be classified under paragraph 314, which reads:

"314. Clothing, ready-made, and articles of wearing apparel of every description, including neck-ties or neckwear composed of cotton or other vegetable fiber, or of which cotton or other vegetable fiber is the component material of chief value, made up or manufactured, wholly or in part, by the tailor, seamstress, or manufacturer, and not otherwise provided for in this act, fifty per centum ad valorem: provided, that any outside garment provided for in this paragraph having India rubber as a component material shall pay a duty of fifteen cents per pound and fifty per centum ad valorem."

Manifestly the only question is whether this "wearing apparel" may properly be said to be "made wholly or in part of lace, or in imitation of lace." If it is, paragraph 339 would cover it more specifically. The circuit court held that, although to some extent trimmed with lace, the corsets do not appear to be made of lace, because lace does not enter into their structure. We are unable to concur in this conclusion. Whether the lace be a trimming or an insertion, it becomes, when affixed, a part of the article, which must be classified for duty as an article in its entirety,—lace and all. The importers contend that the amount of lace is so insignificant as not to change the condition of the article, for duty purposes, from what it was before the lace was sewed on. The value of the lace relatively to the corsets is about 1 per cent. to 2 per cent. We concur in the finding of the board of general appraisers that:

"It appears, from an inspection of the samples, that the trimming and ornamentation with lace * * * is a significant feature of these goods,

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contributing materially to their appearance, and doubtless to their salability and price. Without doubt, such was the purpose for which it was applied."

Such being the case, it may fairly be held they are within the tariff description, "wearing apparel made in whole or in part of lace," for the lace enhances their value and helps to sell them. It is not a mere incident or immaterial part, like ordinary buttons upon an article of clothing, as suggested, in illustration, in Seeberger v. Schlesinger, 152 U. S. 581, 14 Sup. Ct. 729, 38 L. Ed. 560. In the Hemstitched Initialed Handkerchief Case (U. S. v. Harden, 15 C. C. A. 358, 68 Fed. 182), this court found commercial meaning of the phrase "hemstitched and embroidered handkerchiefs" determinative of the question then before us. In the case at bar, however, there is no question of commercial designation. The decision of the circuit court is reversed, and that of the board is affirmed.

(107 Fed. 17.)

MacVEAGH v. DENVER CITY WATER-WORKS CO. et al.

(Circuit Court of Appeals, Eighth Circuit. March 4, 1901.)

No. 1,476.

RIGHT TO MAINTAIN SUIT—ISSUE AS TO COMPLAINANT'S OWNERSHIP OF CORPORATE STOCK.

On an issue as to complainant's ownership of corporate stock, on which his right to maintain suit depended, a letter was produced, in which, referring to the stock in question, he stated that he did not recall the terms of a transfer thereof made to a gentleman of Boston, and that no doubt the person referred to, whom he named, would cheerfully show the transfer he executed; and if it gave, or the law gave, the purchaser the right to use his name as legal plaintiff, he had such right, and otherwise not, "as I have no interest whatever in the stock, and have not had since the date of the transfer." Besides, complainant testified that he could only say just what he said in the letter; that he had no interest in the stock whatever, but that, if counsel of the then owner needed the use of his name as legal plaintiff, and would protect him from any responsibility for the costs of litigation, he had no objection to its use; and that he knew nothing about the institution of the suit except what was stated in the letters in evidence. There was other testimony to the same effect. *Held*, that it was obvious that he was not the owner of the stock, and that he sustained no trust relation to the owners thereof entitling him to sue in his own name for their benefit.

Appeal from the Circuit Court of the United States for the District of Colorado.

Caldwell Yeaman (Frank E. Gove, on the brief), for appellant.

Joel F. Vaile (Edward O. Wolcott and Charles W. Waterman, on the brief), for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. This suit was commenced on the 30th of September, 1893, in the United States circuit court for the district of Colorado, in the name of Wayne MacVeagh, a citizen of Pennsylvania, as complainant, against the Denver City Water-Works Com-

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pany, a corporation organized and existing under the laws of the state of Colorado; the American Water Works, a corporation duly organized and existing under the laws of New Jersey; the Central Trust Company, a corporation organized and existing under the laws of the state of New York; the Farmers' Loan & Trust Company, a corporation organized under the laws of New York; Dennis Sullivan, and Dennis Sullivan, receiver, a citizen of the state of Colorado. The bill alleges that the complainant is the owner of 570 shares of the capital stock of the Denver Water Company, and seeks an accounting and relief to the extent of the value of the stock, for reasons which need not be stated. To this bill of complaint the defendants interposed a plea to the effect following: That the complainant was not, at the time of the institution of this suit, an owner of any of the stock of the Denver Water Company, and had no interest, legal or equitable, in any of the stock at that time or since; and that the suit was collusively brought in complainant's name because the United Water-Works Company, a citizen of the state of New York, the owner of the stock claimed by complainant, at the time of the commencement of this suit could not maintain the same in the circuit court of the United States because it was and is a citizen of the same state as some of the defendants. This plea was held to be sufficient in form and substance by this court in MacVeagh v. Waterworks Co., 29 C. C. A. 33, 85 Fed. 74. The complainant replied to the plea, and testimony was taken, and on final hearing the lower court dismissed the bill, and thereupon the complainant brought the case to this court by appeal.

The testimony of the complainant himself fully supports the plea, and justifies the action of the lower court in dismissing the bill. In one of his letters, Mr. MacVeagh says:

"It is impossible to answer by cable, as I do not recall the terms of the transfer I made to a gentleman of Boston of my stock in the Denver Water Company stock, which you will recall I vainly strove to induce you to buy, and, failing you, tried to get Mrs. Archer, of Reading, to take it. Failing both, I sold it through, if I remember rightly, Mr. Clark, of Root & Clark, the lawyers representing the purchaser, whose name I am unable to recall. * * * No doubt Mr. Clark will cheerfully show your counsel the transfer I executed. If it gives, or the law gives, the purchaser the right to use my name as legal plaintiff, he has such right; otherwise not, as I have no interest whatever in the stock, and have not had since the date of the transfer. And I have, of course, given no authority to Mr. Venner to use my name on any occasion."

And in his testimony Mr. MacVeagh says:

"I can only say just what I did say in the letter,—that I had no interest in the stock whatever, but that, if counsel of the then owner of the stock needed the use of my name as legal plaintiff, and would protect me from any responsibility for the costs of the litigation, that I had no objection to the use of it. * * * I know nothing about the institution of this suit, except what I have stated in the letters in evidence."

There is other testimony to the same effect. It is perfectly obvious that Mr. MacVeagh had not, when this suit was begun, and has not now, any legal or equitable interest in the stock which is the subject-matter of the suit, and concerning which relief is sought; and sustains no trust relation to the legal or equitable owners of the stock

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which would entitle him to maintain the suit in his own name for their benefit. The decree of the circuit court dismissing the bill is affirmed.

(107 Fed. 18.)

MASSENBERG et al. v. DENISON et al.

(Circuit Court of Appeals, Fifth Circuit. February 19, 1901.)

No. 984.

1. TRIAL—OBJECTION TO EVIDENCE.
   A party offering evidence is entitled to have the specific ground of objection thereto stated.
2. APPEAL—REVIEW—EXCLUSION OF TESTIMONY.
   The exclusion of testimony will not be reviewed on appeal unless the record shows the nature of the objection interposed thereto.
3. LAND CERTIFICATE—PURPORTED TRANSFER—ADMISSIBILITY IN EVIDENCE.
   A purported transfer of a Texas land certificate was apparently executed in 1839, an assignment thereot duly acknowledged by the assignor in 1858, duly recorded in 1859, and duly certified from the proper archives of the county of record. *Held*, that it was admissible as a duly proved and authenticated document.
4. SAME—TRANSFER BY ADMINISTRATOR—ORDER OF COURT—PRESUMPTION.
   After possession and use of a Texas land certificate for 60 years from its unimpeached transfer by an administrator, and 25 years' continued use and possession of the lands patented thereunder, improving the same, and paying taxes thereon, an order of court for the sale of the land, referred to in the transfer, will be presumed.
5. SAME—NECESSITY OF ORDER.
   The act of Texas of January 22, 1836 (1 Sayles' [Old] Laws Tex. p. 366), provides that all proceedings relative to successions, etc., should conform to the Louisiana laws, and the act of Louisiana of January 17, 1838, in force in 1839, providing for the appointment, without notice, of curators for successions amounting to less than $500, declares, for the purpose of diminishing costs, that a curator of such a succession should cause its effects to be sold, and the proceeds applied to pay the decedent's debts in as summary a manner as possible, under the immediate direction of the court. *Held*, that a Texas land certificate transferred in 1839 by an administrator was personalty, and in view of these provisions no order of court for its legal sale and transfer was necessary, it being all the property belonging to the decedent's estate, and worth much less than $500.

Appeal from the Circuit Court of the United States for the Northern District of Texas.

This was a suit in equity, brought by the appellants in the court below for an injunction to restrain the appellees from prosecuting a certain action at law pending in said court for the recovery of a tract of land of about 3,000 acres in Stephens county, Tex. The bill alleged, in substance, the following facts:

That in 1838 Richard M. Hopkins was the duly appointed, qualified, and acting administrator of the estate of Lewis C. Denison, deceased, having been so appointed by the county court of Red River county, Tex. That said estate was small, and in debt, and the property belonging to it did not amount to $500 in value. That said Hopkins, administrator, had obtained from the board of public land commissioners, and held as such administrator, the following land certificate, viz.:

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"No. 425.

"This is to certify that Richard M. Hopkins, administrator of the estate of Lewis C. Denison, deceased, appeared before the board of land commissioners for the county of Red River, and proved according to law. Deceased arrived in this county in the year 1835, and, being a married man, is entitled to one league and labor of land, upon condition of paying at the rate of $3.50 for every labor of irrigable land, and $2.50 for every labor of arable land, and $1.20 for every labor of pasture land secured to him for this certificate.

"Given under our hands this 3rd day of March, 1838.

"W. M. Matthews, P. B. L. C.
"James Latimer.

"B. Gooch, Clk."

That on February 7, 1839, said Hopkins, administrator, for a valuable consideration, sold and transferred two-thirds of said certificate to Henry Smith, and indorsed on the certificate the following:

"Republic of Texas, Red River County. Know all men by these presents that I, Richard M. Hopkins, administrator, by virtue of a decree of the honorable probate court for the county of Red River, do hereby assign and set over unto Henry Smith two-thirds of the land called for by the within certificate. Witness my hand and seal this the 7th day of February, 1839.

"[Seal.] R. M. Hopkins, Administrator."

That on November 27, 1858, said Hopkins duly acknowledged the execution of said indorsement before the clerk of the county court of Red River county, Tex., and said certificate, with indorsement thereon, was duly filed for record and recorded in the office of the county clerk of Red River county in the record of deeds on February 14, 1859. That the possession of the land certificate passed to Henry Smith, and through him to complainant Massenberg, who caused the same to be located on the lands in controversy, the lands to be surveyed, the field notes and certificate to be properly returned to the land office, and the patent to issue, paying all expenses in the premises; and that the patent was delivered to Massenberg, and since he and his grantees have occupied and possessed the land, cultivating and improving the same, and paying all taxes thereon.

On the hearing the uncontradicted evidence introduced by appellants established prima facie the foregoing allegations of the bill. The appellees (defendants below) introduced no evidence. There was a decree for the defendants below, and the plaintiffs appeal, and now urge the following specification of errors: "(1) The court below erred in refusing the injunction prayed for and in dismissing the bill, because complainants showed title to the land certificate involved herein by a written transfer of same, made by R. M. Hopkins, administrator of Lewis C. Denison, on February 7, 1839, when said certificate was not located on any land, and was personal property; and the undisputed evidence showed the following facts: That said Hopkins was the duly appointed, qualified, and acting administrator of said Denison; that said estate was small, and in debt, and the property belonging to it did not amount to $500 in value; that said Hopkins, administrator, obtained said certificate, and it was issued and delivered to him, in his name as administrator, March 3, 1838, and he made said transfer on February 7, 1839, and acknowledged same November 27, 1858, and said certificate and indorsement was recorded February 14, 1859; that the possession of said certificate passed to Henry Smith and S. H. Perkey, and through them to W. E. Massenberg, who caused the same to be located on the land in controversy in 1874, the land to be surveyed, the field notes to be properly returned, and patent to be issued to and delivered to him in 1875, he paying all expenses in the premises; and that the patent was delivered to Massenberg, and since then he and his grantees have occupied and possessed the land, cultivating and improving the same, and paying all taxes thereon, these expenses and taxes amounting to several thousand dollars. And these undisputed facts, in connection with the lapse of over sixty years since the certificate was transferred, showed a valid sale and transfer of said certificate, and made at least a prima facie case in favor of complainants, which was not in any

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way rebutted by defendants, and the burden of proof was on defendants to defeat such case, and they introduced no evidence whatever, and the court below erred, under these undisputed facts, in holding that the burden was on complainants to procure and introduce in evidence an order of the probate court authorizing such sale by said administrator. (2) The court below erred in refusing the injunction prayed for and in dismissing the bill, because complainants showed title to the land certificate involved herein by written transfer of same made by R. M. Hopkins, administrator of Lewis C. Denison, on February 7, 1839, when said certificate was personal property, and under the laws of Louisiana and Texas at that date no order of the probate court was necessary in order to pass a good title to personal property in a sale and transfer thereof by a curator or administrator; and the court erred in holding that complainants must introduce in evidence an order from the probate court authorizing such sale, a valid sale, and transfer of such certificate. (3) The court below erred in refusing the injunction prayed for and in dismissing the bill, because the undisputed evidence showed that complainants were the equitable owners of the land involved herein, and they were entitled to a decree in their favor as prayed for. (4) The court below erred in dismissing the bill and refusing complainants any relief whatever, because the undisputed evidence showed that complainants, at great trouble and expense, had selected from the public domain the land involved herein, had located this certificate on the land, had the land surveyed and field notes returned to the land office of Texas, had the patent issued, and had looked after and protected and improved the land in good faith, and had paid all taxes on it for over twenty-five years,—all of which cost and was reasonably worth $1,345; and but for said services and money this certificate would have become worthless, and mere waste paper; and defendants now adopt all these acts by suing for and claiming the land, and in equity and good conscience complainants were entitled to hold the land until said sum and interest was paid to them by defendants."

J. M. Avery, for appellant.

E. J. Simpkins, for appellee.

Before PARDEE and SHELBY, Circuit Judges, and TOULMIN, District Judge.

After stating the facts as above, PARDEE, Circuit Judge, delivered the opinion of the court.

This case has been here before on an appeal from a decree dismissing the complainants' bill for want of equity, and is reported in 71 Fed. 618, 18 C. C. A. 280. This court then held that the facts charged in the bill, substantially as recited above, entitled the complainants to equitable relief, and remanded the cause for hearing. After remand it appears that complainants filed in the circuit court an amended bill, setting forth the facts more explicitly, but presenting the same case as in the original bill. There was an answer and replication, and on the hearing the complainants introduced evidence establishing the facts alleged in the bill. The defendants offered no evidence. The court below filed no written opinion, but probably gave an oral one, for the appellants state the question involved as follows: "The principal question in the case is this: Are the facts established sufficient to show a valid sale and transfer of a two-thirds interest in the land certificate in question to Henry Smith, as claimed in the bill?" and the appellees say: "The only question considered and passed upon by the trial court in this case was as to the admissibility of the purported transfer of a two-thirds interest in the Denison land certificate by R. M. Hopkins,

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administrator of the Denison estate, to Henry Smith." A careful scrutiny of the transcript shows, in regard to the purported transfer, that it was introduced in connection with the other documentary evidence of the complainants, and in the memorandum of offering the clerk notes as follows: "To the introduction of which the respondents excepted," and the court did not pass upon, and at the time decide, the objections of the respondents noted above, but stated that it would "hear all the testimony offered, and pass upon and decide the objections in connection with reaching a decision upon the whole case." The transcript nowhere shows the grounds or character of the objection, nor any motion to suppress the document referred to as evidence in the case. A party offering evidence is entitled to have the specific ground of objection stated. Beach, Mod. Eq. Jur. § 538. "So, too, if testimony is objected to and ruled out, it must still be sent here with the record subject to the objection, or the ruling will not be considered by us." Blease v. Garlington, 92 U. S. 1, 8, 23 L. Ed. 521. As this record stands, we might well pass upon this appeal without noticing any objection to the testimony introduced in the court below. However, we are clear that, as the purported transfer was apparently executed in 1839, duly acknowledged by Richard M. Hopkins before the clerk of court in Red River county in 1858, and duly recorded in 1859, and is duly certified from the proper archives in Red River county, it was admissible in evidence as a duly proved and authenticated document. That document admitted in evidence and considered in connection with the other undisputed evidence of the complainants below, the defendants offering no evidence, we find that the complainants show a case entitling them to equitable relief, and the first assignment of error is therefore well taken.

We understand the appellees to contend that the complainants failed to show a complete equitable title, because no order or decree of the probate court of Red River county authorizing Richard Hopkins, administrator, to sell the two-thirds interest in the Denison land certificate, is shown. There are two answers to this: (1) After 60 years' possession and use of the certificate and 25 years' continued possession and use of the lands patented thereunder, improving the same, and paying taxes thereon, such order of court referred to in the unimpeached transfer of the land certificate will, if necessary, be presumed; and (2) at the time of the transfer such land certificate was personal property, and no order of court was necessary for its legal sale and transfer. See Cox v. Bray, 28 Tex. 247; Dodge v. Litter, 73 Tex. 322, 11 S. W. 331; East v. Dugan, 79 Tex. 329, 15 S. W. 273. The act of Texas of January 22, 1836, among other things provided, "All proceedings relative to successions, matters of probate," etc., "shall be regulated and governed agreeably to the principles and laws in similar cases in the state of Louisiana;" and this was the law in Texas on the subject at the time of the alleged transfer. See 1 Sayles' (Old) Laws Tex. p. 366. The act of Louisiana of January 17, 1838, in force at the time Hopkins, administrator, procured the land certificate and sold the interest to Henry Smith, provides as follows:

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"That the article eleven hundred and seventy-eight of the Civil Code of the state of Louisiana, be so amended that whenever satisfactory proof shall have been made to any judge of the court of probates, that a succession is so small, or is so much in debt, that no person will apply for, or be willing to accept the curatorship, on complying with the existing laws on this subject, the judge of the court of probates, where such succession is opened, shall have the power without any previous notice or advertisement to confer the curatorship of such succession on such person as he may think proper. That the curator so appointed, shall cause the effects of said succession to be sold, and the proceeds to be applied to the payment of the debts of the deceased; the whole to be done in as summary a manner as possible, to diminish costs, and under the immediate direction of the judge of the court of probates; such curator to be allowed a reasonable compensation for his services; and shall not be compelled to furnish bond and security, except in cases where the judge shall deem it necessary, and that in all cases the judge of the court of probates shall fix the compensation of the curator, and the amount of security, when he requires it, provided that this law shall not apply to successions amounting to upwards of five hundred dollars." Civ. Code La. (Morgan) page 168.

In regard to this amendment the supreme court of the United States, in Simmons v. Saul, 138 U. S. 439, 453, 11 Sup. Ct. 369, 373, 34 L. Ed. 1054, 1061, said:

"The history of this provision leads to the conclusion that it was the intention of the legislature that administration of such small successions should be granted without previous notice, and that the settlement by them should be done in as summary a manner as possible."

The evidence shows that the estate of Denison was in debt. There was nothing belonging to it except this land certificate, worth much less than $500. This being true, we are of opinion that no order of sale was required to pass a valid title to the land certificate at a time when (and for long after) such certificates passed from hand to hand on delivery with almost the same facility as promissory notes payable to bearer. All the equities in this case appear to be with the complainants below, appellants here. See Underwood v. Dugan, 139 U. S. 380, 11 Sup. Ct. 618, 35 L. Ed. 197; Wetzel v. Railway Co. (C. C.) 56 Fed. 919. The decree of the circuit court is reversed, and the cause is remanded, with instructions to enter decree in favor of the complainants as prayed for in their bill.

(107 Fed. 33.)

THOMPSON et al. v. McCONNELL et al.

(Circuit Court of Appeals, Fifth Circuit. February 26, 1901.)

No. 1,007.

1. HOMESTEAD—EXEMPTION—FRAUDULENT CONVEYANCE.
   A rural homestead of an insolvent, being exempt from execution by positive statute (Rev. St. Tex. 1895, art. 2396), cannot be the subject of a fraudulent conveyance as against the grantor's creditors.
2. SAME—WHAT LAW GOVERNS—FEDERAL COURTS.
   What real estate is subject to or exempt from execution issued from federal courts is governed by the law of the state where the real estate is situated.
3. STATE STATUTES—CONSTRUCTION BY FEDERAL COURTS.
   Decision of a state court showing the state's policy to liberally construe its exemption statutes is binding on the federal courts in consider-

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ing whether or not certain real estate in such state is subject to execution issued out of the federal courts.

4. HOMESTEAD—CONVEYANCE—INTENT TO ABANDON—FRAUD.
Where an insolvent conveys the homestead to his wife, and she thereafter contracted to convey the land to B. in exchange for cattle, but, though the cattle were delivered, and possession of the homestead given, the sale was not completed, but was subsequently rescinded, such attempted sale did not show an attempt to abandon the homestead, and thus raise a presumption of fraud in the disposition of the homestead as against the husband's creditors.

5. SAME—EXCESS OF LAND CONVEYED—INTENT.
Tex. Rev. St. art. 2396, provides that a rural homestead of a debtor to the extent of 200 acres shall be exempt from sale on execution. *Held*, that the fact that a deed of an insolvent homestead calling for only 200 acres in fact conveyed 220 acres did not render the conveyance void as against the husband's creditors, where it appeared that neither the husband nor wife had actual knowledge of the exact amount of land included, and the first knowledge of the excess arose from a survey made after suit was brought.

6. SAME.
Where a deed to a homestead conveyed 20 acres in addition to the amount which was exempt, which was inadvertently included, the rule that a deed fraudulent in part as against the grantor's creditors is fraudulent in toto did not apply, since such rule is not applicable to an excess of a few acres inadvertently included.

7. SAME—CONVEYANCE BY HUSBAND TO WIFE.
Tex. Const. art. 16, § 50, and Tex. Rev. St. 1895, art. 636, requiring the wife to consent to and join in a conveyance of a homestead, and articles 635, 4618, requiring an acknowledgment by her on privy examination, did not preclude a husband from conveying the homestead directly to his wife, since, as she is not required to join in such conveyance, the statutes enacted for her protection and benefit have no application.

8. SAME—LIMITATION OF ACTIONS—SUSPENSION—MARRIED WOMEN.
Tex. Rev. St. 1895, art. 3342, declares that peaceable and adverse possession of real estate for five years bars a recovery, and section 3201 provides that such statute shall not run against a married woman. Laws April 1, 1895, abolished such exception, but provided that the disability of married women shall continue for one year from and after the passage of the act, and that they shall have, therefore, the same time to sue as is allowed others by the provisions of the act. *Held*, that limitations did not begin to run against an action to recover real property by a married woman until one full year had expired after the act took effect, and that a contention that the time elapsed before the adoption of the amendment should be counted allowing married women one year to sue after the adoption of the amendment was not sustainable.

9. SAME—DIRECTION OF VERDICT.
Where in an action for the recovery of real property it would have been the court's duty to have set aside a verdict for the defendants if returned, the court properly directed a verdict in favor of plaintiffs.

In Error to the Circuit Court of the United States for the Northern District of Texas.

J. M. McCormick (P. B. Ward and Wendel Spence, on the brief), for plaintiffs in error.

H. N. Atkinson, for defendants in error.

Before PARDEE and SHELBY, Circuit Judges, and TOULMIN, District Judge.

SHELBY, Circuit Judge. This is an action of trespass to try title, and was brought July 9, 1898, in the district court of Bosque

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county, Tex., by H. G. McConnell, Mrs. M. A. Hudson, and her husband, W. T. Hudson, citizens of Texas, against W. C. Thompson and others. The defendants in possession of the land sued for were the tenants of L. V. F. Randolph, who, on motion, was made party defendant as landlord. Rev. St. Tex. 1895, art. 5253. Randolph is a citizen of the state of New Jersey. On his petition the case was removed to the circuit court of the United States for the Northern district of Texas. It was alleged in the petition that the plaintiff M. A. Hudson was, on January 1, 1897, lawfully seised and possessed of 200 acres of land, with improvements thereon, described in the petition, situated on the Brazos river, Bosque county, Tex. It is averred that for a valuable consideration, on the 12th of November, 1897, she and her husband sold and conveyed an undivided one-half interest in the lands to her co-plaintiff, H. G. McConnell. The defendants answered, denying all the allegations contained in the petition, and pleaded the statute of limitations of five years. In response to the plea of the statute of limitations the plaintiffs filed a supplemental petition, alleging that the plaintiff M. A. Hudson was, at the time the defendants took possession of the lands in controversy, a married woman, and has been ever since the defendants took possession of the land. The case was tried in the court below on these issues, and resulted in a verdict and judgment for the plaintiffs.

The evidence showed that W. T. Hudson became the owner in fee simple of the real estate sued for on January 1, 1875. He was the common source of title of both the plaintiffs and the defendants. On February 18, 1887, L. V. F. Randolph obtained a judgment against W. T. Hudson in the United States circuit court for the Northern district of Texas for $57,926.66. On February 20, 1889, W. T. Hudson, in consideration of one dollar and love and affection, conveyed to his wife, M. A. Hudson, the real estate in question, describing it by metes and bounds, and stating that it contained 200 acres. This conveyance was properly acknowledged and recorded on January 5, 1891. On January 28, 1893, an execution was issued on the judgment in the case of Randolph against W. T. Hudson, which was levied on the land in controversy. The land was sold on this execution, and the marshal conveyed it to L. V. F. Randolph by deed dated the 27th day of March, 1893. At the time W. T. Hudson conveyed the land in the suit to his wife, he and his family lived on it in a two-story house. He continued to occupy the house with his family until about the 1st of May, 1889, when he and his family moved to Haskell county, Tex. At the time he made the conveyance to his wife, he was insolvent, and owned no other real estate. Before moving to Haskell county, W. T. Hudson negotiated a trade with E. Y. Brown to the effect that Brown, in consideration of a sum of money and the conveyance to him of the real estate sued for, was to transfer to Mrs. M. A. Hudson a herd of cattle. Possession of the cattle was turned over to W. T. Hudson, who placed John Brown, a son of E. Y. Brown, in possession of the land. Brown occupied the land under this agreement for several years, and Hudson held possession of the cattle. The trade, however, was never com-

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pleted. No deed was ever delivered conveying the land to Brown, nor a bill of sale transferring the cattle. Brown paid taxes, but no rent, on the land. The trade was finally abandoned, and the herd —at least a part of it—surrendered to Brown or his agents. During this time, John Brown, being sued or threatened with suit by Randolph, surrendered possession of the land to him, and Randolph placed Thompson and the other defendants in possession as his tenants. The evidence tended to show that, if the trade between W. T. Hudson and Brown had been consummated, the cattle would have been transferred to Mrs. M. A. Hudson. The evidence was conflicting as to whether the Hudsons intended to and did acquire another homestead in Haskell county. It was shown by survey that the tract of land described as 200 acres really contained 220 acres. The court instructed the jury to find for the plaintiffs for an undivided 200 acres out of the land in controversy. The defendants excepted to this charge. A verdict was rendered in accordance with the instructions of the court, and to reverse a judgment thereon this writ of error was sued out.

1. The evidence, as stated, shows that W. T. Hudson owned the real estate in question. He was indebted to Randolph, who obtained a judgment against him. Hudson conveyed the land to his wife, M. A. Hudson. When Randolph obtained the judgment, and when W. T. Hudson made the deed to his wife, the land was occupied as a homestead by Hudson and his family, and to the extent of 200 acres was not subject to be sold to satisfy Randolph's judgment. Rev. St. 1895, art. 2396. It is unquestionably a general rule that property which is exempt by a positive statute from liability for the owner's debts is not susceptible of a fraudulent alienation, and, consequently, not within the statute of frauds. Bump, Fraud. Conv. (1st Ed.) p. 268; Wood v. Chambers, 20 Tex. 247; Fellows v. Lewis, 65 Ala. 343, 354; Thomson v. Crane (C. C.) 73 Fed. 327.

2. What real estate is to be subject to and exempt from execution issuing from the United States courts is governed by the local law where the real estate is situated. Fink v. O'Neil, 106 U. S. 272, 1 Sup. Ct. 325, 27 L. Ed. 196; Nichols v. Levy, 5 Wall. 433, 18 L. Ed. 596; Spindle v. Shreve, 111 U. S. 542, 4 Sup. Ct. 522, 28 L. Ed. 512; Rev. St. U. S. 916. This case is, therefore, to be examined in the light of the Texas law. The homestead of a family, not in a town or city, under the Texas statute and constitution, consists of not more than 200 acres, with the improvements thereon. Rev. St. 1895, art. 2396; Const. art. 16, § 51. It has been the constant policy of the state, in its constitution and legislation, as construed by many decisions of its supreme court, to favor by liberal interpretations the exemptions in favor of the debtor. These decisions construing the state's constitution and statutes are as binding on this court as the constitution and statutes themselves. Elmendorf v. Taylor, 10 Wheat. 152, 6 L. Ed. 289; Post v. Supervisors, 105 U. S. 667, 26 L. Ed. 1204.

3. At the time W. T. Hudson made the deed to his wife, Randolph, as his judgment creditor, had no claim on the homestead of 200 acres, which were embraced in the conveyance. As Wheeler, C. J.,

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in Martel v. Somers, 26 Tex. 551, said: "The conveyance cannot be deemed fraudulent as to creditors, because the homestead was not liable to be taken in execution or to forced sale for the payment of debts." The husband clearly has the right to give his homestead to the wife. His creditors cannot complain, because they are not injured. This is distinctly held in Blum v. Light, 81 Tex. 414, 16 S. W. 1090, where it is said that the husband may make a voluntary conveyance of the homestead to the wife, and his creditors cannot complain. The deed, therefore, of W. T. Hudson to his wife, was not made invalid by the fact that Randolph held an unsatisfied judgment against the former. Hargadene v. Whitfield, 71 Tex. 482, 9 S. W. 475. Was there anything else in the transaction to make it voidable? If Hudson had the right to give his wife the homestead, she had the right, the husband joining in the deed, to convey it to Brown in exchange for cattle. This trade, however, was never completed, and has no bearing on the question involved in the case, except as evidence tending to show the intention of W. T. Hudson in making the deed to his wife. If she had attempted to sell the homestead for money, and had failed to complete the sale, it would not, we think, tend to show fraud in the conveyance of her husband to her. She having only attempted to do what she had the right to do, we cannot think her act raises any presumption of fraud. In Blum v. Light, supra, the husband and wife conveyed the homestead to a third person for $3,100 in cattle and a note for $600. As a consideration for the wife's joining in the conveyance, the wife was to receive the cattle as her separate property. This transaction was held valid as against the creditors of the husband. It would be equally valid, it seems, for the husband to convey the homestead direct to the wife; and, if the conveyance makes it hers, she can, of course, do as she pleases with it, so far as her husband's creditors are concerned. If the trade with Brown had been completed, and the ownership of the cattle were in controversy here, and it could be shown that the transaction between Hudson and his wife, and the exchange with Brown of the homestead for the cattle, were all artifices for the purpose of abandoning the homestead and putting the proceeds in the cattle out of the reach of W. T. Hudson's creditors, the real title to and beneficial interest in the cattle being in W. T. Hudson, then the cattle might be subjected to the satisfaction of Randolph's judgment. Darst v. Trammell, 27 Tex. 129; Blum v. Light, supra. But the contest here is as to the homestead. The husband conveyed it to the wife. The title is still in her if the deed is valid. If the title vested in her, Randolph got no title by the marshal's deed conveying the land as the property of W. T. Hudson. Let it be granted that there was evidence tending to show that Hudson would not have conveyed to his wife if he could have sold the homestead for cattle, and safely, as against his creditors, have taken the title to the cattle in his own name. Grant that the evidence tended to show that he was made generous to his wife by the stress of his insolvency, and that he would have sold the homestead for cash or for cattle except for his insolvency. This, we think, would not alter the case. He could not sell the homestead without the wife's

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consent. She had rights in it that the law is made to protect. She could have declined to join in the sale unless she was provided with an equivalent,—with something she deemed equal to the shelter secured by the homestead laws. Whatever his intentions may have been, the wife's doing no unlawful act, and the creditor being deprived of no legal right, we can see no reason based on the trade with E. Y. Brown for holding the deed invalid. But there are other reasons urged for declaring the deed void, which must be separately considered.

4. It is contended that the deed is made void because it contains 20 acres in excess of the homestead. The conveyance to M. A. Hudson being prior in date to the marshal's conveyance to Randolph, the former had prima facie the better right. On the record evidence, the plaintiffs below, after proving that the land sued for was the homestead at the date of the conveyance by Hudson to his wife, were entitled to recover. The defendants below became the actors in the attack on the deed to Mrs. Hudson. It called for only "200 acres" apparently,—only for the homestead. It required the survey to show the 20-acre excess. This survey was not made until April 14, 1899, after this suit was brought. Mrs. Hudson was not trying to reform or correct the deed. It has not been reformed or corrected. Generally, a deed entitles the grantee, as against the grantor and those claiming under him, to recover the part of the land that the grantor was entitled to convey and which he did convey. If it includes other lands, which the vendor, as against his creditors, had no right to convey, that fact does not prima facie vitiate the deed as to the lands rightly conveyed. To have that result, fraud must be shown, and it must be proved that the vendee knew of the excess, and so participated in the fraud. If Randolph, after the return of the execution unsatisfied, instead of causing the marshal to sell the land, had filed a bill in equity to vacate the deed of Hudson to his wife for fraud, the deed would have been set aside only as to the 20 acres. As to the 200 acres, it would be good in equity as against him. Why should it not also be good at law? In some cases it has been said that a deed fraudulent in part is fraudulent in toto; but this rule should not be applied to a case where an excess of a few acres are inadvertently included in a deed. It is a general rule that, if a judgment is taken wrongfully for more than is due, the fraud destroys the whole. Peirce v. Partridge, 3 Metc. (Mass.) 44. But, if no fraud is intended, and the attachment or judgment is taken for too much inadvertently, it will be valid for the correct amount. Felton v. Wadsworth, 7 Cush. 587. And when there are several grantees in the same deed it may be valid as to one and invalid as to another. Anderson v. Hooks, 9 Ala. 704; Gary v. Colgin, 11 Ala. 514; Prince v. Shepard, 9 Pick. 176. The evidence shows that the tract of land held by Hudson was originally a larger tract, and that 100 acres had been sold off. There was no evidence that he or his wife knew the number of acres in the tract. When he came to convey to her the homestead, it is described as containing 200 acres. After this suit was brought, the survey was made. and it was then, so far as this evidence shows, for the first

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time ascertained that the homestead, as described by metes and bounds, contained 220 acres. The levy made on the land in the case of Randolph against Hudson, and the marshal's deed to Randolph, are not set out in the record; but it is stated in the record that the levy was on the "land in controversy," and that the deed conveyed "the land in controversy." We conclude that in both the levy and deed the description was as in the petition, to wit, "200 acres of land on the Brazos river," etc., describing it by metes and bounds. There is no evidence to show that any fraud was intended by the insertion of the 20 acres in excess of the homestead, or that the excess was known either to the grantor or grantee, or even to Randolph, before the survey. We think, therefore, that the deed is not made invalid as to the homestead by the insertion inadvertently of the 20 acres in excess of the homestead of 200 acres. This view is sustained in Martel v. Somers, 26 Tex. 551, 560; and by Brewer, J., in Farwell v. Kerr (C. C.) 28 Fed. 345; and by Hawley, J., in Thomson v. Crane (C. C.) 73 Fed. 327. Even if the husband had knowledge of the excess in the deed, and had fraudulent intent as against his creditors, it would not make the deed to the wife void as to the homestead (Bell v. Devore, 96 Ill. 217); otherwise, the husband could, by an artifice and fraud of which the wife was innocent, defeat her homestead rights by an act which appeared to her to better secure them. These conclusions are as applicable in a court of law as in a court of equity, for a deed or bill of sale may be held valid at law as to part of the property conveyed or transferred and invalid as to part. Weller v. Wayland, 17 Johns. 102. There is nothing in the Texas statute (Rev. St. 1895, art. 2545) that conflicts with these principles. It only contains the language common to such statutes, making voluntary conveyances "void as to prior creditors." In Kerrison v. Cole, 8 East, 231, 232, the instrument in question was a bill of sale and mortgage of a ship, which, by statute, was declared to be "utterly null and void to all intents and purposes." In the instrument was a covenant to repay the money lent. Mr. Justice Lawrence held that the instrument might be good in part and bad in part, and that the undertaking to repay the money was good. It is clearly a just rule, when good and valid provisions are mixed with bad and invalid, to sustain the former whenever a separation can be made. This would not be done, however, in a case where a statute by its express terms declares the whole deed or contract void on account of some provision which is unlawful; nor where there is some all-pervading vice, such as actual fraud, participated in by both parties to the contract or deed. But there is no such statute applicable to this case, and no such proof of fraud. Lord Hobart quaintly said "that the statute is like a tyrant; when he comes he makes all void; but the common law, like a nursing father, makes void only that where the fault is, and preserves the rest." Norton v. Simmes, Hob. p. 48, 12c; Anderson v. Hooks, 9 Ala. 704, 706.

5. It is conceded in the brief for the plaintiffs in error that "the husband can convey directly to the wife his separate estate as well as community realty, neither being a homestead." Story v. Mar-

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shall, 24 Tex. 306, 307. The learned counsel contends, however, that the husband cannot convey the homestead directly to the wife, because the constitution and statutes of Texas provide that the wife must consent to and join in the conveyance of the homestead. Const. art. 16, § 50; Rev. St. 1895, art. 636. When the wife joins in such conveyance, the statutes provide for an acknowledgment by her on privy examination. Rev. St. 1895, arts. 635, 4618. It is urged that, these provisions not being complied with, the deed by Hudson, conveying the homestead to his wife, is void. The statutes requiring the privy examination of the wife as to conveyances of the husband and of her separate property are for her protection and benefit. They are not applicable, we think, to a conveyance of real estate by the husband to the wife. It being conceded that the husband, under the Texas law, can convey his real estate direct to the wife, there is no reason why he cannot convey to her the homestead to which he has the title. The consent and privy examination of the wife are required only when the conveyance is made to another. As she does not sign, it is not necessary for her to acknowledge a deed to herself. Her acceptance of the conveyance and claim of right under it shows her consent to it. The reason of the law requiring her acknowledgment is not applicable to a conveyance made to her, and the statute has no application.

6. It remains for us to consider the defense of the statute of limitations of five years. Peaceable and adverse possession of real estate for five years bars a recovery. Rev. St. Tex. 1895, art. 3342. Brown went into possession in May, 1889. This suit was brought July 9, 1898. The evidence shows that the plaintiff below, M. A. Hudson, was a married woman when the land was conveyed to her and when the adverse possession commenced, and has remained a married woman to the present time. Article 3201 of the Revised Statutes of Texas of 1879 provided that this statute of limitations should not run against a married woman. This exception in favor of married women remained the law until April 1, 1895, when the statute was so amended as to permit the limitation to run against married women. The amending statute left out married women in the list of those against whom the statute was not to run pending the disability. This language is then used:

"Provided that limitation shall not begin to run against married women, until they arrive at the age of twenty-one years; and, further, that their disability shall continue one year from and after the passage of this article, and that they shall have thereafter the same time allowed others by the provisions hereof." Rev. St. 1895, art. 3352.

Until April 1, 1895, article 3201, supra, made the disability of coverture complete. The amending act of April 1, 1895, removes the disability as to married women over 21 years of age, but it is provided that the disability shall continue for one year after the act takes effect. One year after the amending act took effect married women had no disabilities. From that period,—one year after the act took effect,—they start even with men and single women, and then they are to "have the same time allowed others by the provisions hereof." The act gives the married woman over 21 years of

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age one year to learn that her disabilities are removed, and it is then applied to her as to men and single women. One year after the passage of the amendment it began to apply equally to married and single women. Five years had not elapsed when this suit was brought from the removal of Mrs. M. A. Hudson's disabilities of coverture. We are advised that this statute has not been construed by the supreme court of Texas. We cannot concur in the contention of the plaintiff in error that the time elapsing before the adoption of the amendment should be counted against married women, giving them only one year to sue after the adoption of the amendment.

7. The material facts in the case are proved by record evidence or by uncontradicted evidence. The conflict is about matters that are immaterial. Where the case depends on evidence about which there is no conflict, and of a kind from which different inferences cannot be reasonably drawn, the court may direct the verdict. If it would be the plain duty of the court to set aside a verdict if given for the defendants, the court should direct the jury to find for the plaintiffs. Pleasants v. Fant, 22 Wall. 116, 22 L. Ed. 780. The court properly directed the verdict for the plaintiffs. The judgment of the circuit court is affirmed.

(107 Fed. 41.)

TOOTLE et al. v. COLEMAN et al.

(Circuit Court of Appeals, Eighth Circuit. March 11, 1901.)

No. 1,459.

1. GARNISHMENT—DEBT DUE CREDITOR OF ANOTHER STATE SUBJECT TO.
   The right to garnish a debtor is not limited to the situs of the chose in action, and a garnishment by a citizen of one state of a debtor of the same state, whose creditor resides, whose debt was contracted and is payable in another state, is such an attachment of the chose in action as will authorize the court to obtain jurisdiction to dispose of it by publication of the summons against the defendant.

2. REMOVAL—ESTOPPEL FROM DENYING JURISDICTION.
   One who removes a case from a state to the federal court is estopped from attacking the jurisdiction of the latter upon any ground except that the court from which it was removed had no jurisdiction.

3. PARTY CONDUCTING DEFENSE IN ANOTHER'S NAME ESTOPPED BY JUDGMENT.
   One who instigates another to do a wrongful action, and, when the wrongdoer is sued, takes upon himself and conducts the defense of the case, is estopped from again litigating with the plaintiff in that action the issues there decided.

4. DEFECT OF PARTIES WAIVED BY FAILURE TO PRESENT BY DEMURRER OR ANSWER TO THE MERITS.
   A defect of parties plaintiffs or defendants through misjoinder or nonjoinder is waived by a failure to suggest the same by demurrer or answer.

5. CREDITOR INSTIGATING CONVERSION AND DEFENDING CONVERTER BOUND BY JUDGMENT AGAINST HIM.
   A creditor who indemnifies an officer against damages for seizing and converting property, and defends an action against the officer individually for the conversion, is estopped by the judgment against him from

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again litigating with the plaintiffs in that action the issues there decided.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Kansas.

Kate Tootle, W. W. Wheeler, Joshua Motter, and F. S. Dameron, the plaintiffs in error, are the surviving members of the co-partnership styled Tootle, Hosea & Co., which in 1890 was composed of these plaintiffs in error and W. E. Hosea. Hosea died in 1893, and the plaintiffs in error continued the mercantile business of Tootle, Hosea & Co., assumed their liabilities, and received their assets, as partners under the name of Tootle, Wheeler & Motter. On January 10, 1890, Tootle, Hosea & Co. commenced an action against Thomas Lynch, and caused a writ of attachment to be issued against him and delivered to the United States marshal for the district of Kansas. R. L. Walker was at that time the marshal, and they gave him a bond of indemnity in the sum of $4,102, conditioned, among other things, that they would pay all damages to him which should result from his seizure under this writ of attachment of "certain merchandise situated in the storeroom now occupied by Coleman & Lynch, on Douglas avenue, Wichita, Kansas." The Coleman & Lynch referred to in this bond were R. R. Coleman and C. T. Lynch, the defendants in error in this action. Walker seized their goods under this writ of attachment, and disposed of them. Coleman & Lynch brought an action at law against him in one of the state courts of Kansas for his seizure and conversion of their goods. He delivered the summons served upon him to the attorneys for Tootle, Hosea & Co., and they answered for him that the property which he seized was the property of Thomas Lynch, the defendant in the attachment suit, and that he had lawfully taken it under the writ in that action. This action resulted on December 4, 1895, in a judgment against Walker for $4,873.20 damages and $214.42 costs. H. C. Solomon, John W. Adams, and George W. Adams were the attorneys for Tootle, Hosea & Co., who brought the attachment suit, and they continued to act for that firm until the plaintiffs in error succeeded them, and have since acted for the plaintiffs in error in all the litigation which has grown out of that attachment. They were hired and paid by Tootle, Hosea & Co. and their successors to defend Walker in the action just mentioned, and Walker neither paid nor agreed to pay anything for their services. On October 28, 1897, the defendants in error, Coleman & Lynch, commenced the action now before us. They were residents and citizens of the state of Kansas, and the plaintiffs in error were residents and citizens of St. Joseph, in the state of Missouri. For the sake of brevity, the plaintiffs in error will be called the "defendants," and the defendants in error the "plaintiffs," in speaking of this action. The defendants were conducting a mercantile business in St. Joseph under the name of Tootle, Wheeler & Motter, and various parties resident in Kansas were indebted to them in various sums, payable at St. Joseph, for goods purchased of them in that city. Coleman & Lynch sued the defendants in a state court in the state of Kansas, and garnished their debtors residing in that state. These debtors answered in the garnishee proceedings that they were indebted to the defendants in amounts which in the aggregate exceeded the claim of Coleman & Lynch. No service of summons was made upon the defendants otherwise than by publication under the statutes of Kansas. On December 11, 1897, the defendants removed this action to the United States circuit court for the district of Kansas. They then appeared specially in that court and moved to dismiss the action and to discharge the garnishees because the state court of Kansas had not acquired and could not acquire any jurisdiction over them by the garnishment of their debtors and the publication of the summons, and because the United States circuit court had acquired no jurisdiction. This motion was denied, and the defendants excepted.

For a cause of action, the plaintiffs alleged in their original petition that the defendants had directed and caused R. L. Walker, the United States marshal, to seize and convert their property. They also averred that they had brought the action and recovered against Walker the judgment for this conversion which has been recited, and that the defendants had employed and

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paid the attorneys and conducted the defense of that action for Walker, and were the real parties in interest therein. On motion of the plaintiffs these averments regarding the trial of the action and the judgment against Walker were stricken from the petition, and thereupon the plaintiffs filed an amended petition in which they alleged that the defendants instigated and caused the conversion of their property, and sought to recover the value thereof. The defendants answered with a denial of every allegation of the amended petition, and an averment that the property in controversy belonged to Thomas Lynch, the defendant in the attachment suit, and that it was lawfully levied upon by Walker under the writ in that action. The plaintiffs replied that the issues tendered by the plea of justification had been tried in the action between them and Walker; that, while Walker was the nominal defendant, the defendants were the real defendants in that action; that they had given the bond of indemnity which induced Walker to make the levy; that they had employed and paid the lawyers who defended him in the action against him for conversion; that they were the real defendants in that suit; that judgment had been rendered against Walker therein; and that all the issues tendered by the plea of justification became res adjudicata between the plaintiffs and defendants by virtue of that judgment. The defendants moved to strike from the reply all allegations referring to the trial and judgment in the action against Walker. They demurred to the reply. They moved to dismiss the action. They objected to any evidence under the pleadings, to the introduction in evidence of the pleadings and judgment in Coleman & Lynch against Walker, and insisted in every way possible that the trial and judgment in that case were immaterial to any issue in this action. The court below denied their motions, overruled their demurrer, received the pleadings and judgment in the Walker case in evidence, and refused to permit the defendants to contradict the findings in that case relative to the ownership of the goods seized by Walker and their value. The plaintiffs introduced evidence, which was not contradicted, tending to show that Tootle, Hosea & Co. gave the bond of indemnity to Walker before he seized the goods of the plaintiffs; that he was a mere nominal party to the action of Coleman & Lynch against him; that the defendants were the real parties in interest in that action; that they hired and paid the attorneys who acted for Walker, and really inspired and conducted the defense. At the close of the evidence the court below instructed the jury to return a verdict for the plaintiffs for the amount of the judgment against Walker, and interest at 6 per cent. from the date of its entry. The defendants challenge this judgment by their writ of error.

John W. Adams and H. C. Solomon (George W. Adams, on the brief), for plaintiffs in error.

J. D. Houston (J. V. Daugherty, on the brief), for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The first objection urged against the judgment in question is that the court below was without jurisdiction because the state court of Kansas in which the action was commenced could not obtain jurisdiction over the defendants, who were residents and citizens of Missouri, or over the choses in action owned by them, by means of garnishment of their debtors, who resided in Kansas, and by service of the summons upon the defendants by publication at the suit of the plaintiffs, who were also residents and citizens of Kansas. The statutes of that state in terms authorize such garnishments, and the application of the amounts due to the defendants from the garnishees to the satisfaction of the plaintiffs' demand, upon publica-

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tion of the summons against the defendants. Gen. St. Kan. 1897, c. 95, §§ 48, 72, 227, 228. The ground of the objection is that the situs of the choses in action attached by the garnishment was in St. Joseph, Mo., where the debts were contracted and were payable, and where the creditors of the defendants resided; and the argument is that these choses in action could not be attached where they were not located. This theory has received the sanction of the supreme court of Kansas in Railway Co. v. Sharitt, 43 Kan. 375, 23 Pac. 430, and the condemnation of the supreme court of the United States in Railroad Co. v. Sturm, 174 U. S. 710, 19 Sup. Ct. 797, 43 L. Ed. 1144, in which the Kansas case is reviewed and disapproved. There is no essential difference between the facts of the case in hand and those which conditioned the latter decision, and it is not only decisive of the issues in this case, but is in accord with reason, with the great weight of authority, and with the general understanding and practice of the profession. It is true, generally speaking, that the situs of a chose in action is the residence of its owner,—the domicile of the creditor. But the power to prescribe the remedies by which a debt may be collected and disposed of is not limited to the domicile of its owner. The creditor must often resort to the residence of the debtor to recover the amount due him, and must avail himself of the remedies prescribed by the debtor's state for this purpose. In this state of the case it is competent, just, and common legislation for the state of the debtor to provide for the protection of its home creditors by statutes which enable them to prevent their debtors residing in another state from taking out of the state the money due them from their debtors within the state, and from compelling their creditors to follow them into another state to collect moneys they justly owe them, while the debts to the home creditors can be more conveniently and speedily satisfied out of the moneys due to their debtors from debtors residing in their own state. Administration, attachment, and garnishment laws are all of this character, and they have met general approbation. They do not rest upon the proposition that the situs of the chose in action is the domicile or the state of the debtor, but upon the fact that the debtor himself is there, and that his state governs his acts, and may lawfully so prescribe and control the remedies for the collection and transmission to his creditor of the money he owes that justice shall be done not only to his creditor, but also to that creditor's creditor residing in the state of the debtor. They rest upon the fact that while the situs of the debt or of the personal property, for all the purposes of its ownership, is in the state of the creditor, yet the debtor has its control, its actual possession, and a legal notice to him places it in the custody of the law, and subject to the process of the court of the state in which he resides. This is solid ground. It is consonant with reason and with reality. It governs the administration of estates of deceased persons, concerning which Mr. Justice Gray, in Wyman v. Halstead, 109 U. S. 654, 656, 3 Sup. Ct. 417, 27 L. Ed. 1068, said, "The general rule of law is well settled that, for the purpose of founding administration, all simple-contract debts are assets at the domicile of the debtor." Wilkins v. Ellett,

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9 Wall. 740, 19 L. Ed. 586, 108 U. S. 256, 27 L. Ed. 718. It lies at the foundation of the attachment and garnishment laws of the states, and sustains the action of the court below in this case. The origin of these laws is the custom of foreign attachment in the city of London. Under that custom the garnishee alone was summoned. The defendant received no notice, and at the conclusion of the proceedings the garnishee was required to pay his debt to the plaintiff, and was released from liability to the defendant. An attachment or garnishment is in the nature of a proceeding in rem. It proceeds upon the theory that the res is attached; that notice to the debtor or the party in control of the personal property places his obligation to pay or the property in his control at the disposition of the court. Such a notice attaches the debt,—the res; and, when this has been done, notice to the defendant which will give to the court ample jurisdiction to dispose of the thing attached may be given by publication, or by such other means as have been lawfully provided by statute, upon well-settled principles. Our conclusion is that the right to garnish a debtor is not limited to the situs of the chose in action, and a garnishment by a citizen of one state of a debtor of the same state, whose creditor resides, whose debt was contracted and is payable in another state, is such an attachment of the chose in action as will authorize the court to obtain jurisdiction to dispose of it by publication of the summons against the defendant. Railroad Co. v. Sturm, 174 U. S. 710, 19 Sup. Ct. 797, 43 L. Ed. 1144; Reimers v. Manufacturing Co., 70 Fed. 573, 574, 17 C. C. A. 228, 229, 37 U. S. App. 426, 429, 30 L. R. A. 364; Mooney v. Manufacturing Co., 72 Fed. 32, 38, 18 C. C. A. 421, 427, 34 U. S. App. 581, 592; Newland v. Reilly, 85 Mich. 151, 48 N. W. 544; Cofrode v. Gartner, 79 Mich. 332, 44 N. W. 623; Cahoon v. Morgan, 38 Vt. 236; Drake, Attachm. § 474; Embree v. Hanna, 5 Johns. 101; Blake v. Williams, 6 Pick. 286, 303; Harvey v. Railway Co., 50 Minn. 405, 407, 52 N. W. 905; Hardware Co. v. Lang, 127 Mo. 242, 246, 29 S. W. 1010; Howland v. Railway Co., 134 Mo. 474, 478, 36 S. W. 29.

The position of counsel for the defendants that, notwithstanding this rule of law, the state court had no jurisdiction of this case, because the supreme court of Kansas had decided in one case in 1890 that a court of that state could not obtain jurisdiction by the means here employed, while the decision of the supreme court in Railroad Co. v. Sturm, 174 U. S. 710, 19 Sup. Ct. 797, 43 L. Ed. 1144, had not been rendered when this action was commenced, in 1897, cannot be permitted to prevail, for two reasons: In the first place, the law was not changed by the erroneous decision of the supreme court of Kansas in Railway Co. v. Sharitt, 43 Kan. 375, 23 Pac. 430, and the power had been granted and the duty imposed by the legislature of Kansas upon its courts to take jurisdiction of actions of this kind by service of garnishment and publication of summons in the manner adopted in this case. Under this settled rule of law, the state court had jurisdiction notwithstanding the mistake of the supreme court of Kansas. In the second place, a single decision of the highest court of a state is insufficient to establish an erroneous rule of construction of the statutes of that state, clearly dis-

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approved by the supreme court of the United States and the great weight of authority throughout the country.

It follows from this conclusion that the state court obtained sufficient jurisdiction of the subject of this action and of the defendants by the garnishment and the service of the summons upon the defendants by publication to authorize the disposition of the moneys due from the garnishees by the judgment of the court, and the defendants are estopped by their removal of the cause from attacking the jurisdiction of the federal court on any other ground. It does not lie in the mouth of one who has removed a case from the state to the federal court to claim that the latter has no jurisdiction of the case, except upon the ground that the court from which it was removed was without jurisdiction. Cowley v. Railroad Co., 159 U. S. 569, 583, 16 Sup. Ct. 127, 40 L. Ed. 263; Purdy v. Wallace Muller & Co. (C. C.) 81 Fed. 513, 515.

The next question for consideration is the effect of the pleading and evidence of the judgment between the plaintiffs and R. L. Walker, who was the United States marshal whose deputy levied the writ upon the property of the plaintiffs. The defendants gave to Walker the bond of indemnity which induced him to seize this property. The plaintiffs sued him for the conversion of these goods. The defendants hired and paid the lawyers who conducted his defense. These were the same lawyers who brought the attachment suit, and who are protecting the defendants in the present case. In all this litigation they represented the defendants. While in the action against Walker they signed the pleadings and papers as his attorneys, they were in reality conducting these proceedings, defending the action, procuring evidence, cross-examining the witnesses of the plaintiffs, not only for Walker, but also for the real parties in interest,—the defendants who had indemnified him. The issues presented and tried in that case were whether the property seized by Walker belonged to the plaintiffs or to Thomas Lynch, the defendant in the attachment suit, and what the value of that property was when it was taken from the plaintiffs. The defendants, through their attorneys, conducted the trial of these issues in the action against Walker, and the jury found them in favor of the plaintiffs. While their names did not appear upon the record, they were the real defendants, the real parties in interest, and the parties who actually made and conducted the defense. The inevitable effect of these facts is that, in any suit between the plaintiffs and the defendants upon the same cause of action involved in the action against Walker, the issues concerning the title and the value of the property seized are res adjudicata, and cannot be again litigated. One who instigates another to do a wrongful act, and, when the wrongdoer is sued, takes upon himself and conducts the defense of the case, is estopped from again litigating with the plaintiff in that action the issues there decided. Lovejoy v. Murray, 3 Wall. 1, 18, 18 L. Ed. 129. The judgment against Walker was therefore a conclusive determination against the defendants of the issues whether or not the plaintiffs were the owners of the property seized, and of the value of that property.

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But it is contended that in the pleading of this judgment and in its introduction in evidence many and fatal errors were committed. Let us first clearly understand the nature of this action, and then consider the soundness of this contention. This was not an action upon the judgment against Walker. It was an action for the same seizure and conversion of the property for which the judgment against Walker was rendered. But that judgment did not determine that these defendants were liable for or should pay the amount thereof. For this reason that judgment alone would not authorize the court to enter a judgment against the defendants. Other evidence was requisite to establish the proposition that they were liable for this conversion. It was necessary to try and determine issues which were not considered in the action against Walker, before the judgment against him would warrant a recovery against the defendants. Those issues were whether or not the defendants gave the bond of indemnity, and thereby instigated the taking and conversion, and whether or not they assumed and conducted the defense, and thus became the real defendants in the action against Walker. In other words, it was important to the plaintiffs' recovery here that they should establish four propositions: (1) That the defendants gave the bond of indemnity, and instigated Walker to take and convert the property; (2) that they assumed and conducted the defense to the action against him for the conversion; (3) that the property seized was their property; and (4) its value. The judgment against Walker was no evidence of the first two propositions, but it was conclusive evidence against the plaintiffs of the last two. Thus it will be seen that the cause of action could not be based upon the judgment, but that it was for the conversion, and that it was necessary to establish two propositions by evidence dehors the record in the Walker case, while that judgment was conclusive evidence of the other two. We are now ready to consider the objections to the pleadings and the evidence of this judgment.

It is assigned as error that the trial court overruled the motion to strike from the reply that part which related to the judgment against Walker, and that it overruled a demurrer to the reply. There are two reasons why this judgment cannot be reversed on account of these rulings: The first is that the defendants pleaded new matter in their answer,—that the property seized was owned by Thomas Lynch, and was taken by Walker under the writ in the attachment suit against him,—and the averments in the reply concerning the judgment against Walker constituted a pertinent answer to this new matter, under the statutes of Kansas. Gen. St. Kan. 1897, p. 122, § 103. The argument that it was unnecessary for the defendants to plead this new matter, under the decision in Kerwood v. Ayres, 59 Kan. 343, 53 Pac. 134, in order to prove it, and that therefore the plaintiffs had no right to reply to it, is not persuasive. When the defendants unnecessarily pleaded this matter, they opened the door and invited the plaintiffs to reply to it. However, their remedy was not a motion to strike out part of the reply; it was not to pick the mote out of their brother's eye; but it was to take the beam out of their own, to cure their own fault, to withdraw

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the unnecessary new matter from their answer. This they did not do, and the motion to strike out this part of the reply was properly denied. The second reason is that the pleadings, proceedings, and judgment in the action against Walker were competent and conclusive evidence between the parties of the title to the property in controversy and its value; and if they were pleaded when they should not have been the only effect of this error was to give the defendants notice of this evidence earlier than they would otherwise have received it. This notice could not have prejudiced them, and error without prejudice is no ground for reversal.

It is insisted that the ruling of the court in striking the plea of this judgment from the original petition rendered the question whether or not it could be properly pleaded in the reply res adjudicata. But the two questions are not the same, and a court is not estopped before the trial of a case from correcting any erroneous ruling it may have made in the settlement of the pleadings.

It is said that the admission into the reply of this plea of the judgment against Walker constituted a departure in pleading. But the cause of action remained the same,—the taking and conversion of the property; and the plea of the judgment was a mere plea of an estoppel of the defendants from denying the truth of the two facts,—the title and the value of the property seized, whose existence was challenged by the new matter in the answer. There is no departure from a cause of action for conversion to a cause of action on the judgment.

It is insisted that the court below should have dismissed this action at the trial because it appeared from the pleadings that Walker and the defendants were joint tort feasors, that the plaintiffs had elected to sue Walker separately, and that, having made that election, they could not maintain an action against the defendants jointly. This objection was that there was a defect of parties defendant. If there was any such defect, the defendants were required to present it by demurrer if it appeared on the face of the pleadings, and by answer if it did not. 2 Gen. St. Kan. 1897, c. 95, §§ 89–91. The objection here under consideration appeared upon the face of the original petition. It was not suggested by demurrer or by answer, and was first presented by a motion to dismiss the action upon the opening of the trial. The defendants' silence, and their answer to the merits of the case without suggesting the defect, waived this objection. Their motion came too late, and it was rightly overruled.

It is insisted that the pleadings and judgment against Walker were not competent evidence of the title and value of the property, because that action was not brought against Walker as marshal, and because the evidence does not establish the fact that the plaintiffs knew that the defendants were conducting Walker's defense. But it is not the name, title, or capacity in or under which Walker was sued that conditions the estoppel of the defendants by the judgment against him. It is the fact that they instigated the taking, and assumed and conducted the defense of the action for the taking, of the property of the plaintiffs. It was their own acts which es-

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topped them, and it was utterly immaterial under what name or title they performed these acts. It made no difference, therefore, whether Walker was sued for this taking, and the defendants defended him as marshal, gentleman, yeoman, or man. They were equally estopped by their deeds.

Nor is the objection that this judgment can have no effect because the plaintiffs did not know that the defendants were defending Walker worthy of more serious consideration. H. C. Solomon, John W. Adams, and George W. Adams were the attorneys of Tootle, Hosea & Co. and of the defendants. As such attorneys they brought the action against Lynch and issued the writ of attachment. They defended Walker, and their names appear as his attorneys upon all the pleadings and papers of the defendant in that suit. It is the common, almost the universal, practice for plaintiffs who procure the levy of an attachment to defend the person who levies it, when he is attacked by third parties on account of his seizure of the property under the levy. We cannot be blind, and we cannot presume that the defendants were blind, to this fact. The names of the attorneys for the defendants upon the pleadings and papers of Walker raised a clear presumption that the defendants were conducting his defense, and, in the absence of contradicting evidence, this was sufficient evidence to warrant the conclusion that the plaintiffs were aware of this fact.

It is specified as error that one of the witnesses for the plaintiffs was permitted to testify that he handed to Solomon the bond of indemnity in the attachment suit in the presence of Wheeler, one of the defendants, and Solomon said: "I wrote that myself, and signed the name of Tootle, Hosea & Co. to it. We were not required to do anything further towards it." But this was certainly competent evidence against Wheeler, and Wheeler was a member of the copartnership composed of the defendants in this suit. He saw the bond, heard the testimony of his attorney, and silently admitted its truth.

It is contended that the court erroneously admitted a part of a letter written by H. C. Solomon, one of the attorneys of the defendants, on September 4, 1896, to R. L. Walker, in which he wrote that his clients were paying all the costs of the litigation growing out of the attachment suit against Lynch. But the testimony of one of the defendants was that he left the entire charge and control of this matter to his attorneys, and the evidence was conclusive and uncontradicted that this letter was written by Mr. Solomon, one of these attorneys, and that the portion of it which was not produced could not be found after diligent search. In this state of the case, it was a competent admission of the defendants that they were paying the expense of conducting the defense of Walker, as well as of the other litigation growing out of the seizure of the property of the plaintiffs.

After the plaintiffs had introduced in evidence the pleadings and judgment against Walker, and had produced evidence tending to show that the defendants gave the bond of indemnity to him before the writ was levied upon the property of the plaintiffs, and that

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they had assumed and conducted his defense of the plaintiffs' action against him, the court refused to permit the defendants to introduce evidence that the defendant in the attachment suit was the owner of the property, and directed the jury to return a verdict for the plaintiffs for the amount of the judgment against Walker, and interest from the date of its entry. It is contended that these rulings were erroneous, because the defendants were entitled to contest the title to the property in issue, because the evidence was insufficient to warrant the instruction, and because interest should have been allowed upon the value of the property, and not upon the amount of the judgment against Walker. There was no error in the exclusion of the evidence offered by the defendants, because the judgment against Walker rendered the title to the property res adjudicata as against them. The evidence was uncontradicted and conclusive that the defendants assumed and conducted Walker's defense, and that they gave him the bond of indemnity before he seized the property. But this was an action for damages for the taking and conversion of the property. It was not an action upon the judgment against Walker, and for that reason interest should not have been computed upon the judgment, but upon the value of the property converted. This error made the judgment $232.44 more than it should have been. The judgment of the court below is accordingly affirmed to the amount of $5,870.56, but it is not affirmed as to the remaining $232.44, or any part thereof. It is modified as to this amount, and the case is remanded to the court below, with directions to so modify its judgment of March 16, 1900, that it shall stand for the amount of $5,870.56, instead of for the sum of $6,103. Railroad Co. v. Estill, 147 U. S. 591, 622, 13 Sup. Ct. 444, 37 L. Ed. 292.

(107 Fed. 50.)

TERRY v. DAVY.

(Circuit Court of Appeals, Sixth Circuit. March 9, 1901.)

No. 901.

1. APPEAL—FAILURE TO TAKE BILL OF EXCEPTION—PRESUMPTION.
   Neither the evidence nor the charge of the court on an issue as to the citizenship of plaintiff in error being before the court, as no bill of exceptions was taken, it will be assumed that the jury properly found the issue against him.

2. JUDGMENT OF STATE SUPREME COURT—REVIEW BY CIRCUIT COURT OF APPEALS.
   The circuit court of appeals has no power to review the judgment of a state supreme court.

3. SAME—ERROR RAISING FEDERAL QUESTION.
   Alleged error of a state court in not following the law of another state does not raise a federal question.

4. CITIZENSHIP OF PARTY—ISSUE RAISED BY PLEA IN ABATEMENT—INDEPENDENT SUBMISSION TO JURY.
   The act of March 3, 1875, makes it the duty of the circuit court to dismiss any suit on its own motion at any time, if it appears to its satisfaction that the suit "does not involve a dispute or controversy properly

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within the jurisdiction of said circuit court"; and hence where defendant properly raised a question of jurisdiction by plea in abatement alleging that both parties were citizens of the same state, there was no error in submitting the same to the jury as a separate issue, irrespective of the issue on the merits.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

Harvey Terry, for plaintiff in error.
J. V. Lee, for defendant in error.

Before LURTON and SEVERENS, Circuit Judges, and CLARK, District Judge.

LURTON, Circuit Judge. The plaintiff in error, describing himself as a citizen of North Carolina, brought an action in the circuit court of the United States for the Southern district of Ohio against John W. Davy, a citizen of Ohio. The defendant pleaded in abatement that the plaintiff "is, and was at the time of commencing said action, a citizen of Ohio." The plaintiff filed a reply to this plea, which, by leave of the court, he several times amended; his last amendment being in these words:

"Now comes Harvey Terry, the complainant, and by leave of court moves to amend his reply filed January 3, A. D. 1900, in said cause, to wit: Added: 'Complainant pleads the general issue of the facts alleged in his bill of complaint,' and the further fact that he is the owner of large tracts of land located in North Carolina, partly farming lands with dwelling houses thereon; that he has paid taxes on said property, of which he is now the owner; that he has voted in North Carolina since his sale of said land and removal described in his bill of complaint. This amendment added to former reply. Harvey Terry."

Thereupon plaintiff entered a motion in these words:

"This cause coming on to be heard at this term of the court, complainant moves the court that this cause may be tried both on the plea in abatement and the general issue of the facts stated in the complaint; the general issue having been pleaded in defense of the plea."

This motion was overruled, and a jury impaneled, to whom was submitted the issue joined upon the plea in abatement, who found upon their oaths that the plaintiff was a citizen of the state of Ohio at the time he instituted his action. Upon this finding the circuit court dismissed the action for want of jurisdiction.

Neither the evidence nor the charge of the court upon the issue as to the citizenship of the plaintiff is before us, as no bill of exceptions was taken. We must, therefore, assume that the jury properly found that the plaintiff in error was a citizen of Ohio when he brought his action in the court below. Inasmuch as diversity of citizenship did not exist, there was no federal jurisdiction, unless the petition set up some right, privilege, or immunity guarantied or secured to him under the constitution, or some law of congress, or treaty made in pursuance thereof. The petition is exceedingly prolix. We have searched in vain for any federal question which would support an action in a federal court between citizens of the same state. No such question is stated. It appears that the defendant, Davy, was a real-estate broker, residing at Columbus, Ohio.

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The plaintiff resided in North Carolina, and owned a large body of land situated in that state, which he was desirous of selling or exchanging. Davy claimed that he had been employed to procure a sale or exchange, and that he did procure a purchaser, or one with whom the plaintiff made an exchange, and that for his services he had earned a commission. He accordingly brought an action against Terry to recover for his services so rendered. This suit was brought in a court of the state of Ohio, and process was duly served upon Terry, who appeared and defended. The suit resulted in a judgment against Terry, which was affirmed in both the circuit and supreme courts of Ohio. 54 N. E. 1110. Terry thereupon paid off the judgment, and later brought the present suit to recover the money so paid, and the damage and loss he had been put to by reason of said claim and suit. The petition seems to rest his "right of restitution and damages" upon the ground that no contract with Davy in respect to a sale or exchange of land in North Carolina was valid unless in writing, and that the Ohio court ought to have applied the law of North Carolina to the decision of the case. It is enough to say that this court has no power to review the judgment of the state court, and this contention of error, in not following the law of North Carolina, does not raise any federal question. The court below was, therefore, without jurisdiction, unless there existed the requisite diversity of citizenship.

The only errors assigned upon the action of the circuit court relate to the action of that court in submitting to the jury the issue as to the citizenship of the plaintiff without also submitting at the same time the issues of law and fact set out in the bill or petition. This question is, perhaps, best exhibited by the fourth and fifth assignments of error, which are as follows:

"(4) It was error in said United States circuit court to have overruled complainant's motion for the trial of said cause upon the general issues of law and facts alleged in complainant's bill when pleaded in defense of the plea. (5) It was error in the court to have submitted to the jury the finding of the question whether Harvey Terry was a citizen of Ohio on the 23d day of August, 1899, or not, without submitting complainant's bill and the pleadings of law and facts in the cause of action for adjudication and determination under the proofs produced on the trial."

There was no error in this. If the plaintiff and defendant were citizens of the same state, the court had no jurisdiction. The act of March 3, 1875, makes it the duty of the circuit court to dismiss any suit, on its own motion, at any time, if it shall appear to the satisfaction of the court that the suit "does not involve a dispute or controversy properly within the jurisdiction of said circuit court." The defendant below properly raised the question of jurisdiction by a plea in abatement. Being thus raised, it was properly submitted to a jury as a separate and independent issue. Hartog v. Memory, 116 U. S. 588, 6 Sup. Ct. 521, 29 L. Ed. 725; Farmington Village Corp. v. Pillsbury, 114 U. S. 138, 5 Sup. Ct. 807, 29 L. Ed. 114; Refining Co. v. Wyman (C. C.) 38 Fed. 574, 3 L. R. A. 503. In Ashley v. Board, 8 C. C. A. 455, 60 Fed. 55, we said, in discussing the practice when the jurisdiction of the court was challenged by proper plea, that "such a question is an independent one, and can-

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not properly be confused with the issue on the merits; otherwise, it could not be determined from the verdict whether it was founded on a question of jurisdiction or of the cause of action." The judgment is accordingly affirmed.

(107 Fed. 52.)

CITY OF MANNING v. GERMAN INS. CO.

(Circuit Court of Appeals, Eighth Circuit. March 11, 1901.)

No. 1,464.

1. ORDER GRANTING OR REFUSING NEW TRIAL WITHIN JURISDICTION OF COURT NOT REVIEWABLE.
   An order granting or refusing a new trial, which the court has the jurisdiction to make, is discretionary with the trial court, and cannot be reviewed by appeal or writ of error in the federal courts.
2. THE QUESTION OF THE POWER TO MAKE ORDER FOR NEW TRIAL REVIEWABLE.
   But the question whether or not the trial court has the jurisdiction to make an order granting or refusing a new trial is reviewable in the federal courts by an appeal or writ of error challenging such order.
3. ORDER FOR NEW TRIAL—REMEDY FOR INCAPACITY OF JUDGE TO SIGN BILL OF EXCEPTIONS.
   An order for a new trial, when the application for it is made in due time, is the proper remedy for the incapacity of the judge who tried the case to settle and sign the bill of exceptions.
4. COURTS WITHOUT POWER TO VACATE OR MODIFY THEIR JUDGMENTS AFTER THE TERM.
   Judgments at law cannot be vacated or substantially modified by the courts which rendered them subsequent to the expiration of the terms at which they were entered, in the absence of motions or proceedings for that purpose during such terms; and the only exceptions to this rule are that clerical mistakes, and such mistakes of fact not put in issue or passed upon as may be corrected by writ of error coram vobis, or by motion in lieu of that writ, and mistakes in the dismissal of a cause, may be corrected after the expiration of the terms.
5. POWER AND PRACTICE OF FEDERAL COURTS IN SETTLING BILLS OF EXCEPTIONS AND GRANTING MOTIONS FOR NEW TRIAL INDEPENDENT OF STATE STATUTES AND PRACTICE.
   Section 914 of the federal statutes was not intended to and did not conform the power or the practice of the federal courts to those of the state courts in matters relating to bills of exceptions, motions for new trials, and methods of review of their judgments.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the Southern District of Iowa.

For former opinion, see 100 Fed. 581.

The writ of error in this case challenges an order granting a new trial of an action brought by the German Insurance Company, the defendant in error, hereinafter called the "plaintiff," against the city of Manning, the plaintiff in error, hereinafter called the "defendant," in which a judgment was rendered in favor of the defendant on August 8, 1899, during the May term of the court below. The May term of that court expired on November 20, 1899, and during that term no motion, or notice of motion, or proceedings towards a motion for a new trial of the action were made or taken. The following November term of that court commenced on November 20, 1899,

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and during that term, and on January 13, 1900, the plaintiff moved for the first time for a new trial of the action, and on the first day of the May term, 1900, that motion was granted. The motion for the new trial was granted solely because the plaintiff had failed to perfect a bill of exceptions under this state of facts: On August 8, 1899, when the judgment was rendered, Judge Woolson, who tried the case, allowed the plaintiff 90 days in which to make a bill of exceptions. There was a dispute between the parties below whether or not this extension of 90 days was subsequently changed by order of the court to 180 days. But Judge Shiras, who heard the motion for a new trial, and found the facts upon which his order was made, decided that there was no such authorized change, and that the time for preparing the bill of exceptions expired on November 7, 1899, during the May term, 1899, of the circuit court. About the 23d day of October, 1899, counsel for defendant wrote to the counsel for plaintiff concerning an extension of time for preparing a bill of exceptions, and he replied that he had no objection to the extension of the time, but that, if counsel for the defendant desired such extension, he requested him to apply for it at once, so that there could be no question in the matter. Defendant's counsel made no application to any one for an extension of time, and it never was extended. On November 7, 1899, when the time to prepare the bill of exceptions expired, Judge Woolson, who tried the case, was so ill that he was unable to attend to his official duties, and he died on December 4, 1899. Judge Shiras, who held the November, 1899, and May, 1900, terms of the court, granted the motion for a new trial because no bill of exceptions had been settled. The order granting the new trial is attacked on the ground that the circuit court had no power to make such an order, and thereby to set aside and vacate its judgment, after the expiration of the term at which it was rendered, in the absence of any motion or notice of motion for that purpose during that term.

B. I. Salinger (A. B. Cummins, on the brief), for plaintiff in error.

George F. Henry (James G. Berryhill, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

An order granting a new trial in an action sets aside and renders void any former judgment therein. Rev. St. § 987. An order granting or refusing a new trial, which the court has the jurisdiction or power to make, is discretionary, and cannot be reviewed by writ of error or appeal in the federal courts. Railroad Co. v. Howard, 4 U. S. App. 202, 1 C. C. A. 229, 49 Fed. 206; McClellan v. Pyeatt, 4 U. S. App. 319, 1 C. C. A. 613, 50 Fed. 686; Village of Alexandria v. Stabler, 4 U. S. App. 324, 1 C. C. A. 616, 50 Fed. 689; Mining Co. v. Fullerton, 19 U. S. App. 190, 7 C. C. A. 340, 58 Fed. 521; City of Lincoln v. Sun Vapor Street-Light Co., 19 U. S. App. 431, 8 C. C. A. 253, 59 Fed. 756; Criner v. Matthews, 32 U. S. App. 405, 15 C. C. A. 93, 67 Fed. 945; Condran's Adm'x v. Railway Co., 32 U. S. App. 182, 14 C. C. A. 506, 67 Fed. 522. But the question whether or not the court had the jurisdiction or power to make an order granting or refusing a new trial and avoiding a former judgment is always reviewable in the federal courts by a writ of error or an appeal challenging the order, because it goes to the effect and finality of the judgment itself. Phillips v. Negley, 117 U. S. 665, 671, 675, 678, 6 Sup. Ct. 901, 29 L. Ed. 1013.

Two questions are urged upon our consideration. The first is whether or not the court had the power to grant a new trial and avoid

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the judgment after the expiration of the term at which it was rendered, and the second is whether or not that power was wisely exercised upon the proofs presented in this case. The second question is not open for consideration here, because, if the court had the power to grant the motion, the exercise of that power was discretionary, and not reviewable in this court. Moreover, it is conceded, and that is the extent to which the authorities cited for the defendant go, that, when the motion or application is made at the term at which the judgment is rendered, or within the time fixed by the rules of the court, an order granting a new trial is the proper remedy for the failure of the defeated party to obtain his bill of exceptions on account of the illness or incapacity of the judge who tried the case. Hume v. Bowie, 148 U. S. 245, 255, 13 Sup. Ct. 582, 37 L. Ed. 438; Nind v. Arthur, 7 Dowl. & L. 252; Newton v. Boodle, 3 C. B. 795, 800; Benett v. Steamboat Co., 16 C. B. 28; Borrowscale v. Bosworth, 98 Mass. 34, 36; Malony v. Adsit, 20 Sup. Ct. 115, 44 L. Ed. 163. The only question for our consideration, therefore, is whether or not the court below had the jurisdiction to grant the motion for the new trial and to avoid the judgment of August 8, 1899, after the expiration of the term at which it was rendered, in the absence of any motion or notice of motion or other proceeding looking to its vacation during that term.

In Sibbald v. U. S., 12 Pet. 487, 491, 9 L. Ed. 1167, 1169, Mr. Justice Baldwin, delivering the opinion of the supreme court, said:

"No principle is better settled, or of more universal application, than that no court can reverse or annul its own final decrees or judgments, for errors of fact or law, after the term in which they have been rendered, unless for clerical mistakes (Cameron v. McRoberts, 3 Wheat. 591, 4 L. Ed. 467; Bank v. Wistar, 3 Pet. 431, 7 L. Ed. 731); or to reinstate a cause dismissed by mistake (The Palmyra, 12 Wheat. 10, 6 L. Ed. 531): from which it follows that no change or modification can be made, which may substantially vary or affect it in any material thing. Bills of review in cases of equity, and writs of error coram vobis, at law, are exceptions which cannot affect the present motion."

In Bronson v. Schulten, 104 U. S. 410, 415, 26 L. Ed. 797, 799, Mr. Justice Miller, in delivering the opinion of the supreme court, after declaring it to be a general rule that judgments and decrees and orders of the courts are under their control, and may be set aside, vacated, modified, or annulled during the term at which they are pronounced. proceeded to say:

"But it is a rule equally well established that, after the term has ended, all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify, or correct them; and, if errors exist, they can only be corrected by such proceeding by a writ of error or appeal as may be allowed in a court which, by law, can review the decision. So strongly has this principle been upheld by this court, that, while realizing that there is no court which can review its decisions, it has invariably refused all applications for rehearing made after the adjournment of the court for the term at which the judgment was rendered. And this is placed upon the ground that the case has passed beyond the control of the court. Brooks v. Railroad Co., 102 U. S. 107, 26 L. Ed. 91; Public Schools v. Walker, 9 Wall. 603, 19 L. Ed. 650; Brown v. Aspden, 14 How. 25, 14 L. Ed. 311; Cameron v. McRoberts, 3 Wheat. 591, 4 L. Ed. 467; Sibbald v. U. S., 12 Pet. 488, 9 L. Ed. 1167; U. S. v. The Glamorgan, 2 Curt. 236, Fed. Cas. No. 15,214; Bradford v. Patterson, 1 A. K. Marsh. 464; Ballard

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v. Davis, 3 J. J. Marsh. 656. * * * It is a profitless task to follow the research of counsel for the defendants in error through the numerous decisions of the state courts cited by them on this point in support of the action of the circuit court. The cases from the New York courts, which go furthest in that direction, are largely founded on the statute of that state, and we are of opinion that on this point neither the statute of that state nor the decisions of its courts are binding on the courts of the United States held there. The question relates to the power of the courts, and not to the mode of procedure. It is whether there exists in the court the authority to set aside, vacate, and modify its final judgments after the term at which they were rendered; and this authority can neither be conferred upon nor withheld from the courts of the United States by the statutes of a state or the practice of its courts."

The conclusion was that an order of the circuit court vacating judgments rendered at a preceding term was void, and must be reversed.

In Phillips v. Negley, 117 U. S. 665, 6 Sup. Ct. 901, 29 L. Ed. 1013, a writ of error was sued out to review an order vacating a judgment and granting a new trial which was made after the expiration of the term at which the judgment was rendered. In the opinion of the supreme court in that case the opinion of Mr. Justice Miller in the case just cited is carefully reviewed, quoted from, and approved in these emphatic words:

"Although the opinion also shows that, upon the facts of that case the action of the circuit court in vacating its judgment after the term could not be justified upon any rule authorizing such relief, whether by motion or by bill in equity, nevertheless the decision of the case rests upon the emphatic denial of the power of the court to set aside a judgment upon motion made after the term, and grant a new trial, except in the limited class of cases enumerated as reached by the previous practice under writs of error coram vobis, or for the purpose of correcting the record according to the fact, where mistakes have occurred from the misprision of the clerk. We content ourselves with repeating the doctrine of this recent decision, without recapitulating previous cases in this court, in which the point has been noticed, for the purpose of showing their harmony. It has been the uniform doctrine of this court."

These opinions settle the question presented in this case. There are no decisions of the supreme court to the contrary. The motion which was granted in this case does not fall within the exceptions founded upon mistake or misprision of the clerk, or upon errors remediable by the common-law writ of error coram vobis. The former relate only to mere clerical errors, and the latter are limited generally to the facts that one of the parties to the judgment had died before the judgment was rendered, or was an infant, or no guardian had appeared or been appointed, or was a feme covert, or that there was error in the process through the fault of the clerk. In the later practice of the courts a motion is substituted for this writ. But the foundation of the order here is not among the errors for the relief of which that writ could be issued. The decisions of the supreme court are controlling authority in this court. A careful examination and review of them discloses the fact that the uniform rule of that court is that judgments at law cannot be vacated or substantially modified by the courts which rendered them, subsequent to the expiration of the terms at which they were entered, in the absence of motions or proceedings for that purpose during such terms; and the only excep-

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tions to that rule are that clerical mistakes, such mistakes of fact not put in issue or passed upon as may be corrected by writ of error coram vobis or on motion in lieu of that writ, and mistakes in the dismissal of a case, may be corrected after the expiration of the terms. The case before us falls under the rule, and not under the exceptions. There was no error of fact or mistake of clerk, court, or counsel in the proceedings at the May term, 1899. The judgment was rendered on August 8, 1899. The term did not conclude until November 20th, in that year. During all that time the opportunity was open to the plaintiff to file his motion for a new trial, and thereby to enable the court to retain its jurisdiction over its judgment. On November 7, 1899, when the time for preparing its bill of exceptions expired, and Judge Woolson was too ill to sign it, there still remained 13 days in which to present the motion for a new trial. No such motion was filed. No notice of such motion was given. The result was that the term ended. The control of the circuit court over its judgment ceased. The successful party was discharged from further attendance, and all the subsequent proceedings without his consent were coram non judice and void. Muller v. Ehlers, 91 U. S. 249, 250, 23 L. Ed. 319; Southern Pac. Co. v. Johnson's Adm'x, 69 Fed. 559, 562, 16 C. C. A. 317, 320, 44 U. S. App. 1, 8.

The act of congress of June 5, 1900 (chapter 717), did not validate the order of the court below, because it was passed after the judgment had become final, and after the rights of the parties to it had vested; and congress had no more power than the court to devest or destroy them by its mere fiat without notice or hearing.

It is suggested that under sections 4091 and 4092 of the statutes of Iowa the order granting this new trial and vacating the judgment may be sustained, and that under Rev. St. § 914, which provides that the practice, pleadings, and forms and modes of proceeding in actions at common law shall conform as near as may be to the practice, pleadings, and forms and modes of proceeding in the state courts, these statutes gave authority to the federal court to grant this order. There are two conclusive answers to this contention. The first is that the question here at issue is not, as Mr. Justice Miller said in Bronson v. Schulten, 104 U. S. 410, 417, 26 L. Ed. 797, one of mode of procedure, but of the power of the federal courts; and authority and jurisdiction can neither be conferred upon nor withheld from these courts by the statutes of a state or the practice of its courts. Section 914 of the federal statutes was not intended to and did not conform the power or the practice of the federal courts to those of the state courts in matters relating to bills of exceptions, motions for new trials, and methods of review of their judgments.

In Re Chateaugay Ore & Iron Co., 128 U. S. 544, 553, 9 Sup. Ct. 150, 152, 32 L. Ed. 508, 511, the supreme court said:

"We are of opinion that the practice and rules of the state court do not apply to proceedings in the circuit court taken for the purpose of reviewing in this court a judgment of the circuit court, and that such rules and practice, embracing the preparation, perfecting, settling, and signing of a bill of exceptions, are not within the 'practice, pleadings, and forms and modes of proceeding' in the circuit court which are required by section 914 of the Revised Statutes to conform 'as near as may be' to the 'practice, pleadings, and

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forms and modes of proceeding existing at the time in like causes in the courts of record of the state' within which the circuit court is held, 'any rule of court to the contrary notwithstanding.' "

In Fishburn v. Railway Co., 137 U. S. 60, 11 Sup. Ct. 8, 34 L. Ed. 585, Chief Justice Fuller, delivering the opinion of the supreme court, said:

"In regard to motions for new trial and bills of exceptions, courts of the United States are independent of any statute or practice prevailing in the courts of the state in which the trial is had."

To the same effect are Railroad Co. v. Horst, 93 U. S. 291, 301, 23 L. Ed. 898; Newcomb v. Wood, 97 U. S. 581, 584, 24 L. Ed. 1085; Nudd v. Burrows, 91 U. S. 426, 23 L. Ed. 286; Missouri Pac. Ry. Co. v. Chicago & A. R. Co., 132 U. S. 191, 10 Sup. Ct. 65, 33 L. Ed. 309.

The result is that the statutes of Iowa did not enlarge or affect the power of the circuit court to vacate the judgment below and to grant the new trial after the expiration of the term at which the judgment was rendered. Moreover, if the court below had been governed by the statutes of Iowa, no power was granted thereby, under the facts of this case, to vacate the judgment and grant the new trial. Those statutes provide that motions for new trials upon the ordinary grounds upon which such motions are filed must be made within three days after the verdict, report, or decision is rendered. Code Iowa 1897, §§ 3755, 3756. No such motion was made in the case in hand. Sections 4091 and 4092 provide that a new trial may be granted after the expiration of the term at which the judgment is rendered for these six causes: (1) For mistake, neglect, or omission of the clerk or irregularity in obtaining the same; (2) for fraud practiced in obtaining the same; (3) for erroneous proceedings against a minor or person of unsound mind, when such errors or condition of mind do not appear in the record; (4) for the death of one of the parties before the rendition of the judgment or making of the order, if no substitution has been made of the proper representative before the rendition of the judgment or order; (5) for unavoidable casualty or misfortune preventing the party from prosecuting or defending; and (6) for error in the judgment or order shown by a minor within 12 months after arriving at majority. These causes for a new trial are of the nature of those errors which could have been corrected by the use of the writ of error coram vobis, and the case at bar fails to present either of them. The only one which has any semblance of relation to the basis of the motion for a new trial here is the fifth, "for unavoidable casualty or misfortune preventing the party from prosecuting or defending." But there was no casualty or misfortune which prevented the plaintiff from prosecuting this action. All that was required of him to enable the court to retain its control over this judgment after the expiration of the term was to file and submit his motion for a new trial within the term. The failure of the court to decide the motion would not have deprived it of jurisdiction. Woods v. Lindvall, 48 Fed. 73, 1 C. C. A. 34, 4 U. S. App. 45. The illness of Judge Woolson did not prevent the plaintiff from obtaining a bill of exceptions. There were

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three circuit judges in this circuit, either one of whom would have granted him an extension of time to prepare his bill or a new trial because he could not obtain the signature of Judge Woolson to his bill at any time before the term expired. It was not the illness of Judge Woolson, or his inability to sign the bill of exceptions, that defeated the plaintiff, but its failure during the May term, 1899, to make any motion or application looking to a review of the trial or judgment to any of the four judges who were within the circuit, and who had the power and ability to grant it. Thus it appears that, even if the statutes of Iowa could control, plaintiff has failed to bring itself within them, and the order granting the new trial and vacating the judgment must be reversed. It is so ordered.

(107 Fed. 61.)

GLADISH v. PENNSYLVANIA CO.

(Circuit Court of Appeals, Sixth Circuit. April 2, 1901.)

No. 883.

MASTER AND SERVANT—INJURIES—RELEASE—FRAUD—EVIDENCE.

Plaintiff sued defendant for injuries sustained while in defendant's employ by its negligence, to which defendant pleaded a release for the sum of $1,500. Plaintiff replied that the release was prepared by defendant, and that, being deaf and unable to read English, plaintiff signed the paper under representations that it contained, in addition to the requirement of payment of $1,500, an agreement to furnish plaintiff with a life position, and that by reason of the failure of the compromise to contain such provision it was invalid, and the minds of the parties never met in any compromise or settlement. At the interview at which the settlement was made, plaintiff was represented by his wife and F., a friend; and, though it appeared that defendant's agent offered to employ plaintiff as long as he behaved himself, he expressly refused to make such provision part of the written contract. Before signing the agreement, F. went into an adjoining room with plaintiff and wife, and read the same to them; and he testified that it was understood that the provision for life employment would not be put in the contract. *Held*, that the evidence was not sufficient to show that plaintiff was deceived in the execution of the settlement, and hence a verdict for defendant was properly directed.

In Error to the Circuit Court of the United States for the Northern District of Ohio.

Action by John Gladish against the Pennsylvania Company. From a judgment on a directed verdict in favor of defendant, plaintiff brings error. Affirmed.

Charles A. Thatcher and Orville S. Brumback, for plaintiff in error.

Elihu W. Tolerton, for defendant in error.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

DAY, Circuit Judge. Plaintiff brought an action against the Pennsylvania Company in the court below to recover for serious injuries sustained because of the head of a hammer flying from the handle while in use by one of the employés of the defendant, striking the

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plaintiff upon the head. The ground of recovery was the alleged defective construction of the hammer, furnished in breach of the duty of the defendant to supply reasonably safe appliances to plaintiff with which to perform his work in its service. The case was disposed of upon an issue made by answer and reply, setting up a release alleged to have been executed by defendant on the 5th day of May, 1899, whereby, in consideration of the sum of $1,500, the defendant was released and discharged from all liability arising from said alleged cause of action. This release purported to be executed by Gladish in the presence of witnesses, and is accompanied by a certificate, also signed by Gladish, that the release was signed after its contents had been made known to him, and that he was fully satisfied therewith. In reply it is alleged: That the defendant, through its superintendent and attorney, persuaded the plaintiff to come to the office of said attorney, who stated that the defendant would pay the plaintiff $1,500, and also give him employment as long as he lived, in settlement of injuries received by him. "And thereupon this plaintiff, relying upon the representations and offer of the said agents of the defendant, did agree to accept the said offer, namely, $1,500 and a life position in the employ of the defendant; and thereupon the paper, a copy of which is attached to the answer of the defendant, was prepared, and this plaintiff was informed by the said agents of the defendant that it contained the terms of compromise so proposed by them and accepted by this plaintiff. And thereupon this plaintiff, being deaf and not being able to read English, did sign said paper under the representations and statement of the agents of the defendant, which this plaintiff then and there believed, to wit, that said paper contained the said terms of said settlement,—that plaintiff would receive the said sum of $1,500 and a life position from defendant in compromise and settlement of said claims against the defendant. This plaintiff further says that he admits that after signing said paper there was paid to this plaintiff the sum of $1,500; but plaintiff says that the defendant, by its attorney and its superintendent, and each of them, repudiated and denied that this plaintiff was to receive any life position, under any circumstances, from the defendant. And so it is that the minds of this plaintiff and the defendant never met in any compromise or settlement whatever."

These allegations of the reply being taken as traversed by the defendant, we have the issue made whether the agreement of settlement in writing was signed by the plaintiff because of the fraudulent conduct of the defendant, by its agents, in informing him (the plaintiff) that it contained the full terms of compromise as agreed to by him, and that the plaintiff, being thus deceived, signed said paper because of the said representations of defendant. The expression in the reply above quoted, concluding the allegations in this respect, "And so it is that the minds of this plaintiff and the defendant never met in any compromise or settlement whatever," is but a statement of the conclusion of the pleader, based upon the previous allegations. The ground of attack upon this written settlement made by the reply of the plaintiff is simply this: An agreement having been made to give the plaintiff life employment as well as the sum of

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$1,500, he was led, because of his inability to hear, or read the English language, and because of said false representations of the defendant; to believe that said written agreement contained the true contract. In other words, plaintiff charged the defendant with fraud and deceit in obtaining the release. No other issue is made. We are not now dealing with the right which plaintiff might have had, upon his claim of facts, to attack the settlement for mutual mistake, or because of the mistake of one and fraud of the other, except as the same is set up in the reply as above stated. At the conclusion of the testimony, the court, being of opinion that the allegations of the reply had not been sustained by sufficient evidence (remarking in this connection that "if counsel could prove that the agents of the company, or anybody speaking authoritatively for it, represented that the writing contained anything it did not contain, that would be a fraud in law, whatever may have been the intention, and would have set aside this settlement"), and being of the opinion that no such testimony had been adduced, and that the court would be compelled to set aside a verdict for the plaintiff if rendered upon the issue, took the case from the jury. The question before us is, was the court right in so doing? We have examined the testimony, and agree with the court below that there was an entire lack of proof to support the only allegation of fraud which was made in the reply. The testimony discloses that, when the settlement was made, the plaintiff, who unfortunately had been rendered deaf as a result of the injury, and could not speak or understand the English language, was accompanied by his wife and one Mr. Fisher, a member of the same fraternal organization with the plaintiff, whose intervention seemed acceptable to Gladish, and who evidenced a friendly interest in his welfare,—spoken of by the learned judge as a man of intelligence. At this interview these persons were met by Mr. Tolerton, counsel for the company, and later by Mr. Potter, an officer of the company. Fisher, on the application to Mr. Tolerton to put into the agreement the stipulation that Gladish should be given a life position, testifies that Mr. Tolerton said he could not put that into an agreement; that they generally took care of their people who were hurt, and it was understood that they would take care of him. Mr. Potter having been sent for and meeting with the parties, and Fisher having broached the matter to him, Mr. Potter said he would give him a position as long as he behaved himself; further, that Mr. Potter said, as testified to by Fisher, in answer to a question on cross-examination, that he would not make the agreement to employ plaintiff a part of the written agreement. "Mr. Potter said he would not do it; that a man might become intoxicated, and he could hold him to the agreement; if he become a drinking man, he could not discharge him. He would not sign a written agreement." Fisher further says that Mrs. Gladish was present and heard this conversation. It further appears that Mr. Fisher was given the written agreement; that he went into another room with Mr. and Mrs. Gladish, and there read the paper to them. Fisher testifies that at the time when the agreement was read over to Mrs. Gladish, in the presence of Mr. Gladish, "there was one thing said to her that I understood,—the life job would not be put

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in the contract; but, as I understood it, he was to have a position as long as he behaved himself." Mrs. Gladish testifies as to her understanding that the paper contained an agreement for life employment, and that she so communicated the matter to her husband. She does not distinctly deny the testimony of Mr. Fisher as to his reading the paper, but rather inferentially gives her understanding of the result of all that took place. Plaintiff also testified that it was his understanding that this paper contained an agreement for a life job. How, then, stands the proof as to the allegation, which was the material one, that the defendant's agents had obtained the execution of the paper by misrepresenting its contents to plaintiff? The testimony fails to maintain this charge. On the contrary, it shows that, when approached by the friend and representative of Gladish, both the attorney and officer of the defendant distinctly declined to put such an agreement into the paper. There is no proof that they made a misrepresentation of the contents of the paper to plaintiff. If the plaintiff was deceived by his own agent or wife as to the contents of the paper, without the connivance or knowledge of the defendant or its agents, such charge would fail to support the allegations of the plaintiff. Upon the issue made, we agree with the learned trial judge that, had the verdict been returned in plaintiff's favor, it should have been set aside for lack of supporting testimony.

Other questions were discussed in the argument, but the case turns upon the one just disposed of. Finding no error in the action of the court below, the judgment will be affirmed.

(107 Fed. 70.)

SUPREME LODGE KNIGHTS OF PYTHIAS v. LLOYD.

(Circuit Court of Appeals, Seventh Circuit. April 9, 1901.)

No. 740.

1. LAW OF THE CASE—SECOND TRIAL.
   Where on writ of error the court determines the question of the power reserved by a benevolent association to change its by-laws, and remands the case on second trial, the ruling became for the court, and on appeal the law of the case.

2. LIFE INSURANCE—USE OF INTOXICATING LIQUORS.
   Whether the death of an insured was caused or superinduced by the use of intoxicating liquors after adoption of a by-law in the association of which he was a member, rendering the policy invalid in respect to a death so caused, was a question of fact for the jury.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

Benson Landon, for plaintiff in error.
Howard E. Leach, for defendant in error.

Before WOODS, JENKINS, and GROSSCUP, Circuit Judges.

PER CURIAM. This case is here the second time. 38 C. C. A. 654, 98 Fed. 66. In the opinion upon the first writ of error, speaking in

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reference to the power reserved by the association to change its by-laws, and in reference to the condition in the contract of insurance requiring "full compliance with all the laws governing this rank now in force or that may hereafter be enacted," it was said:

"No authority rests in the association under this reservation to repudiate obligations as insurer which have become vested under the contract, and the by-law which imposes a new condition, or exempts from liability for a cause of death previously within the insurance, cannot be made retroactive to impair or destroy liability for a pre-existing cause which arose under the contract."

Upon an exception to the refusal of the court to give a special instruction, we are asked to review that ruling, and authorities are cited which it is contended demonstrate the right of the order under such a contract to adopt by-laws which shall exempt it from liability though the death result from a pre-existing cause. Reference is made to Pain v. Société St. Jean Baptiste, 172 Mass. 319, 52 N. E. 502; Stohr v. Society, 82 Cal. 557, 22 Pac. 1125; Supreme Lodge Knights of Pythias v. Knight, 117 Ind. 497, 20 N. E. 479, 3 L. R. A. 409; Smith v. Galloway [1898] 1 Q. B. 71; Loeffler v. Modern Woodmen (Wis.) 75 N. W. 1012; Fullenwider v. Royal League, 180 Ill. 621, 54 N. E. 485. If they had been brought to our attention upon a petition for a rehearing, we could have given these decisions their just weight, but now it is too late to consider them. The ruling made became, for this court and the circuit court, at least, the law of the case. If error was committed, it can be corrected in the case, if at all, only by the supreme court.

The refusal of the court to direct a verdict was not error. The by-law in question was valid, at least in respect to deaths caused or superinduced by the use of intoxicating liquors after its adoption; and whether the death of Lloyd, the assured, was so caused or superinduced was a question of fact, which on the evidence could not properly have been withdrawn from the jury, if, indeed, a state of evidence were supposable which could justify such action. There has been some discussion concerning the meaning of the word "superinduced," but no question upon the point is presented. The charge of the court is not in the record. No exception to it was saved, and the presumption, therefore, is that the jury was fully and properly instructed. The judgment below is affirmed.

(107 Fed. 77.)

BRAGASSA v. ST. LOUIS CYCLE et al.

(Circuit Court of Appeals, Fifth Circuit. February 26, 1901.)

No. 962.

1. BANKRUPTCY—RIGHT TO DISCHARGE—FAILURE TO KEEP BOOKS OF ACCOUNT.
The action of an insolvent, in mingling money of his own with that of his wife, and depositing it together in banks in his wife's name, without keeping any books of account or records showing what portion of such deposits was owned by him, for the admitted purpose of preventing his creditors from reaching it, when such practice was continued until

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he filed his petition in voluntary bankruptcy, constituted a failure to keep books of account or records, with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy, which debars him from the right to a discharge under Bankr. Act 1898, § 14b.

2. SAME—COSTS—FEES OF REFEREE ON APPLICATION FOR DISCHARGE.

Where it becomes necessary to refer an application for a discharge to a referee for the taking of testimony, and the discharge is refused, it is not error to tax the fees of the referee to the bankrupt.

Appeal from the District Court of the United States for the Northern District of Texas.

The bankrupt filed his petition praying to be adjudged a voluntary bankrupt in the proper court on the 10th of June, 1899. Shortly thereafter the court adjudged him a bankrupt, and referred the matter to the referee, who, in proper time, appointed a trustee to the estate. A general examination of the bankrupt was held at the creditors' meeting, and later on, in due course and as provided by law, the bankrupt filed his application to be discharged. The appellees herein resisted the discharge, and filed specifications opposing it. A trial was had upon certain of the specifications, and the referee recommended to the court that the bankrupt be discharged. An application was then made by appellees to re-refer the matter to the referee for further hearing, claiming that they had been misled, etc. The application was sustained, and a new trial of the issues was had before the referee, who again recommended to the court that the bankrupt be discharged. The appellees filed exceptions before the district judge, and the question of discharge or not came before the court on the testimony found in the record. The court refused the discharge, and filed written reasons therefor, fully reported in Re Bragasa (D. C.) 103 Fed. 936.

John W. Wray, for appellant.

W. B. Paddock, for appellees.

Before PARDEE and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. The court a qua found the following specification to be true, to wit:

"That with fraudulent intent to conceal his true financial condition, and to prevent his creditors from collecting their debts, the bankrupt has, in contemplation of bankruptcy, conducted his banking business in the name of his wife, J. E. Bragassa; that he has deposited in the American National Bank and the Farmers' & Mechanics' National Bank, at Fort Worth, Texas, his earnings and income, in the name of his wife, so intermingling his money and property with that which he claims was hers that it is impossible to distinguish how much of said deposits were his and how much belonged to some one else. Wherefore, by reason of such willful and fraudulent management of his affairs, he is now unable to make a clear and intelligent statement of his financial condition previous to or at the time of filing of his petition in bankruptcy."

A careful study of the evidence in the transcript shows that the finding is correct, and this court is compelled to approve the same. The appellant submits several propositions, which, in deference to counsel, we will consider in order:

1. "The language of the specification is too vague, uncertain, indefinite, and general to authorize or permit the introduction of testimony touching the method of the bankrupt in transacting the banking business in the different banks, in connection with himself and wife."

Counsel in his oral argument, as well as in his brief, fails to point out wherein the specification is vague, uncertain, indefinite, or too

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general. In taking the evidence, both sides seemed to well understand the issue. We doubt if the nature of the objection to the discharge called for any detailed specification.

2. "The court erred in holding that the testimony was sufficient, under the fifth specification, to show that the bankrupt intermingled his money with that of his wife in the banks in such a way that it was impossible to distinguish how much of said deposits were his and how much belonged to some one else, and that the same was done by him in contemplation of bankruptcy, and with fraudulent intent."

The answer to this is found in the opinion of the judge below, to wit:

"The record further discloses that no books or records were kept by the bankrupt showing what funds he had and what disposition was made of them, and the bank accounts being kept in the condition in which they were kept throw no light upon the true financial condition of the bankrupt. The only question remaining for disposition is: Did the bankrupt's failure to keep books of account or records from which his true condition might be ascertained arise from the fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy? The intent of the bankrupt must be ascertained from the circumstances surrounding his failure to keep books of account or records. After he failed in business he had a number of business transactions which resulted in his having money in his hands. Some of the money which came into his hands belonged to his wife, and some to himself. He deposited the larger part of it in two different banks in his wife's name. He testified that he did this to keep anybody from 'jumping on' it before he had an opportunity to use it. He was concealing from his creditors that which might have been subject to the payment of their debts, could they have reached it. In view of his own affirmative testimony as to the purpose which moved him in concealing his funds, it is neither unjust nor harsh to presume that he failed to make any record of his receipts and disbursements for a similar purpose. It is but an incident to the concealment of funds from creditors to conceal or fail to keep trace of such funds through books of account or records. In this case the bankrupt kept the banks with which in reality he did business from making any record of funds in his name. The pass books which were issued to him, the checks which he wrote, and the stubs which he kept told no story of any money belonging to him. Even to the extent that ordinary business dealing with banks would compel a record, he avoided making it. The bankrupt was certainly inspired with fraudulent intent to conceal his true financial condition in pursuing this course. It is also quite clear that this was done in contemplation of bankruptcy. He began keeping his bank account in his wife's name in 1897. This was before the bankrupt law had been enacted. This course was then pursued in view of his insolvency, and because of his desire to handle money coming into his possession as he chose. The bankrupt law was passed and became effective on July 1, 1898. He still continued to keep no books of account, no record of his receipts and disbursements, and still continued to mingle his own funds with those of his wife, in the same accounts, in the wife's name, at two different banks, and he pursued this method up to the time he filed his voluntary petition in bankruptcy, on June 10, 1899. When he first contemplated taking the benefit of the act no one knows but himself. However, it was necessarily before he filed his petition, and from that time forward he lived in the consciousness of failing to keep even the records of his banking business in such shape as to be of any assistance or avail in an attempted ascertainment of his true financial condition."

—With all of which we concur.

3. "Two things must concur in order to prevent the discharge of the bankrupt: (1) He must have deposited his money in his wife's name with a fraudulent intent; (2) it must have been done in contemplation of bankruptcy."

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Sufficient evidence of the fact and the intent is found in the record.

4. "It is not the duty of the court, on its own motion, to seek out grounds to defeat a discharge where the statutory prerequisites in the bankruptcy proceedings have been met."

As to this, all that is necessary to say is:

"The judge shall hear the application for a discharge, * * * and investigate the merits of the application, and discharge the applicant, unless he has (1) committed an offense punishable by imprisonment, as herein provided; or (2) with fraudulent [intent] to conceal his true financial condition, and, in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of account or records from which is [his] true condition might be ascertained."

5. "There is no warrant or authority of law for the court to have allowed $50 for compensation to the referee for services on the hearings before him of the specifications opposing the discharge of the bankrupt."

It is a fact that, for the services rendered by the referee on the two trials, the court awarded him $50, but we find that the references were provoked by the bankrupt, and, as the costs were legitimately incurred, we see no other way than to tax the same to the losing party. The judgment appealed from is affirmed.

(107 Fed. 83.)

BAUMAN v. FEIST et al.

(Circuit Court of Appeals, Eighth Circuit. February 25, 1901.)

No. 1,511.

1. BANKRUPTCY—FALSE OATH OF BANKRUPT—IRRELEVANT TO ESTATE—DISCHARGE NOT BARRED.

   Where a bankrupt testified under oath on examination before a referee that he had not stated to certain parties that he had an interest in a certain firm, which firm in fact never engaged in business, such oath not having been made in connection with the administration of the bankrupt's estate or an act affecting the estate, will not bar a discharge under Bankr. Act 1898, § 14b, subd. 1, providing that the court shall discharge a bankrupt unless he has committed an offense punishable by imprisonment, and section 29b, declaring that the bankrupt shall be imprisoned on conviction of knowingly and fraudulently making a false oath in relation to any proceeding in bankruptcy.

2. SAME—STATEMENT UNDER OATH—CONTRADICTION OF STATEMENT NOT UNDER OATH—FALSITY NOT PROVED THEREBY.

   Where a bankrupt was alleged to have made a certain statement not under oath, and afterwards denied the same under oath, his statement under oath was not proved to be false by proof that he made the contradictory statement not under oath.

3. SAME—MUTILATION OF ACCOUNT BOOKS.

   A bankrupt's discharge was not barred by the fact that the account books of a corporation, for which he was bookkeeper, and in which he had no interest, had been mutilated before they came into the possession of the corporation, under Bankr. Act 1898, § 14b, subd. 3, providing that the court shall not discharge a bankrupt who destroys or fails to keep books of account to conceal his true financial condition.

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Appeal from the District Court of the United States for the Southern District of Iowa.

In Bankruptcy. From a judgment of the district court sustaining the objection of Max Feist and others, creditors, to a discharge of the bankrupt, the bankrupt appeals. Reversed.

Isaac Petersberger, for appellant.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. Creditors of William Bauman, bankrupt, filed in the district court the following specifications of objections to his discharge:

"(1) That the said Wm. Bauman has committed an offense punishable by imprisonment under the bankruptcy act, to wit, that the said Wm. Bauman knowingly and fraudulently testified under oath falsely upon examination before Referee John M. Helmick, February 6, 1900, that he did not state to W. B. Wiley, nor to W. H. Wilson, in the city of Davenport, at or about the time of leasing a certain storeroom of said W. B. Wiley, that the P. Bauman Co. was composed of himself and wife, and in stating that he had no interest in said company. (2) That the said Wm. Bauman, with fraudulent intent to conceal his true financial condition, and in contemplation of bankruptcy, destroyed, concealed, and failed to keep books of account or records from which his true financial condition could be ascertained, and that he falsely and fraudulently altered his books and records so that his true financial condition could not be ascertained therefrom, by cutting pages therefrom, by altering and changing and mutilating the books and records of the companies in which he had an interest, to wit, P. Bauman Co. and of Millinery Emporium, so that his true financial condition could not be ascertained therefrom."

The specifications of objections were referred to John M. Helmick, referee in bankruptcy at Davenport, Iowa, to take the testimony, and report his findings of fact and conclusions of law thereon. In compliance with the order of reference, the referee reported the testimony taken by him, together with his findings of fact and conclusions of law, which were to the effect that neither of the specifications was sustained by the evidence, and that the bankrupt was entitled to his discharge. Exceptions were taken to the findings and conclusions of the referee, which were sustained by the district court, and the bankrupt denied a discharge, and thereupon the bankrupt brought the case into this court.

The bankrupt act (section 14b) provides that the court shall discharge the bankrupt "unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of account or records from which his true condition might be ascertained." The first specification rests on the first subdivision of the clause quoted. The burden rests on the objecting creditors to show that the alleged false oath set out in the specification is made criminal, and punished by imprisonment. The twenty-ninth section ("b") declares that the bankrupt shall be punished by imprisonment "upon conviction of the offense of having knowingly and fraudulently made a false oath or account in, or in relation to, any proceeding in bank-

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ruptcy." Plainly, the false oath contemplated by this provision must be one material to the proceedings in bankruptcy. It must have some relation to the bankrupt's estate, or to the bankrupt's act affecting his estate, and must have been made knowingly and fraudulently. Aside from the usual and formal entries, the record before us contains nothing but the testimony of the witnesses and the referee's report. Neither in the testimony nor in the referee's report is there a word or suggestion tending to show that the alleged statement of the bankrupt to Wiley and Wilson had anything to do with the administration of his estate in bankruptcy, or was connected with it in the remotest degree. The alleged remark was made more than a year before the petitioner was adjudged a bankrupt. That is a long time to recollect with verbal accuracy a casual remark; and, in view of the fact that it clearly appears from the testimony that no such firm did in fact engage in business, its relevancy or materiality to the issue in the case is not perceived. It is claimed, however, that proof of this alleged statement establishes the fact that the bankrupt "made a false oath" when he testified that he had no interest in the firm of P. Bauman & Co. Assuming that the bankrupt made the statement, and waiving the question of its materiality, a complete answer to this contention is this: Where one makes a statement not under oath, and afterwards contradicts that statement under oath, his statement under oath is not proved to be false by proof that he made the contradictory statement not under oath. This would be the rule even if both statements were under oath. Dr. Wharton states the rule in these terms: "When the defendant has made two distinct statements under oath, one directly the reverse of the other, it is not enough to produce the one in evidence to prove the other to be false." 2 Whart. Cr. Law, § 1317; U. S. v. Mayer, Deady, 127, Fed. Cas. No. 15,753. Aside from the alleged statement of the bankrupt to Wilson and Wiley, there is no evidence in the record tending to show that he had any interest in the firm of P. Bauman & Co. The referee, who saw the witnesses, and heard them testify, and who was, therefore, in a much better position to judge of their knowledge and veracity than this court, found that this specification was not supported by the evidence; and on the face of the record before us that conclusion was amply warranted. The weight of the testimony is that he was not a member of that firm which was composed of the bankrupt's wife, Mrs. P. Bauman, and one Cash, and was dissolved almost immediately after its formation,—if, indeed, it was ever fully formed. It never did in fact engage in business a single day, but a private corporation was formed, called "The Millinery Emporium," the shareholders in which were P. Bauman (the bankrupt's wife), Charles A. Menter, and Mrs. A. Loper, each of whom owned one-third of the capital stock. There is no charge in this specification that the bankrupt had any interest in the corporation thus formed, and that he swore falsely in relation thereto; and any consideration, therefore, of the question of fact whether he had an interest in that corporation would be irrelevant. What we have said disposes of the first specification.

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The second specification charges that the bankrupt "falsely and fraudulently altered his books and records, so that his true financial condition could not be ascertained therefrom, by cutting pages therefrom, by altering and changing and mutilating the records of the companies in which he had an interest, to wit, P. Bauman Co. and of Millinery Emporium, so that his true financial condition could not be ascertained therefrom." In answer to this specification it is only necessary to say that there is no proof in the record that the bankrupt had any interest in the firm of P. Bauman & Co., if such a firm ever had an existence, and no proof that he was a shareholder or had any interest in the Millinery Emporium. There is proof that he acted as bookkeeper of the Millinery Emporium. The findings of the referee on this subject are:

"5. That no business was done under said firm name [P. Bauman & Co.], but the business was incorporated and opened at said premises under said lease under the name and style of 'The Millinery Emporium.' (6) That said bankrupt was bookkeeper for said corporation. (7) That said bankrupt had no interest in said corporation other than as an employé."

The referee further found that the books the bankrupt was charged with mutilating were not his books, but the books of the Millinery Emporium, a corporation in which he had no interest; and that the books used by this corporation were an old set of books, which had previously been used in some other business by some other person; and that the mutilation referred to consisted in cutting out the leaves of the book containing the old accounts of a business with which the corporation had no concern; and that they were not cut out with any fraudulent intent. These books were before the referee, and he had opportunities of judging of the truth of these statements that this court has not. These findings, which are sufficiently supported by the evidence, dispose of the second specification.

The judgment of the district court sustaining the exceptions to the referee's report and denying the bankrupt a discharge is reversed, and the cause is remanded, with instructions to enter an order confirming the referee's report, and granting the bankrupt a discharge. Ordered accordingly.

(107 Fed. 89.)

In re PAGE.

(Circuit Court of Appeals, Third Circuit. March 22, 1901.)

No. 14.

BANKRUPTCY—ASSETS—SEAT IN STOCK EXCHANGE.

Bankr. Act 1898, § 70, declares that the bankrupt's trustee on his appointment and qualification shall be vested with the bankrupt's title to all property which prior to the filing of the petition the bankrupt could by any means have transferred. Philadelphia Stock Exchange Rules, art. 11, § 4, provides that any member wishing to sell his membership shall have the right to do so, provided he has no unsettled contracts with, or claims against him by, any member of the stock exchange, etc.,—subject, however, to the approval of the proper authorities of the exchange. *Held*, that a bankrupt having no unsettled accounts with members of the exchange at the time of filing his petition in bankruptcy could have trans-

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ferred his seat, which was a valuable right, within section 70, and hence such right of transfer passed to his trustee in bankruptcy, who was entitled to sell the same as part of the bankrupt's assets.[1]

Petition for Review of Proceedings in the District Court of the United States for the Eastern District of Pennsylvania.

In Bankruptcy. For opinion below, see 102 Fed. 746.

George W. Jacobs, Jr., for bankrupt.

Henry R. Edmunds, for trustee.

Before DALLAS and GRAY, Circuit Judges, and BRADFORD, District Judge.

BRADFORD, District Judge. The question before us for decision arises on a petition for a review of certain proceedings in bankruptcy in the district court for the eastern district of Pennsylvania. Edward D. Page was adjudicated by that court a voluntary bankrupt November 16, 1899, being at the time a member of the Philadelphia Stock Exchange, an unincorporated society. He became such member in 1880, paying for his seat or membership about $5,500. It is now valued at $8,000. His membership or seat was not included as an asset in the schedules attached to his petition in bankruptcy. The trustee in bankruptcy, however, caused the seat to be appraised and on his petition the referee ordered that the same be sold at public auction subject to the constitution and by-laws of the exchange regulating membership therein. The district court upon review approved the order made by the referee and directed the trustee to proceed with the sale. The case is now before us on the petition of the bankrupt, and the precise point for determination is whether or not title to the membership or seat vested in the trustee. Section 70 of the bankruptcy act of 1898 provides, among other things, that, subject to a certain proviso and exceptions not material to the present inquiry, the trustee of the estate of a bankrupt shall upon his appointment and qualification be vested by operation of law with the title of the bankrupt, as of the date of the adjudication, to all "property which prior to the filing of the petition he could by any means have transferred." The provisions of the constitution of the exchange relating to membership and its transfer are as follows:

"Article 5.

Sec. 4. A Committee on Admissions, consisting of five members, to which all applications for membership, transfer of membership and re-admissions of suspended members shall be referred. It shall be its duty to inquire into the general standing of the applicant, and make a report thereon to the Governing Committee within one month of the presentation of the application. Until the committee makes a report favorable to the admission of the applicant, he shall not be voted for as a member, unless upon the written application of seven (7) members of the Governing Committee to the President, made within five (5) days after the committee's report has been presented; in which case the Governing Committee may, by a two-thirds vote, reverse the report of the committee, and such reversal shall have the same effect as if the committee's report had originally been favorable. If a report be favorable, the name of the candidate shall be posted in the Stock Exchange, and notice

[1] Franchises and licenses as assets in bankruptcy, see note to Ficher v. Cushman, 43 C. C. A. 389.

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given that a ballot will be taken at the next stated meeting of the Governing Committee in order that every member of the Exchange may have an opportunity of objecting to the candidate's election; such objection shall be in writing to the President of the Governing Committee. The election of candidates for membership shall be held by the Governing Committee, but no election shall be valid unless at least eighteen (18) ballots be cast; and if five (5) ballots be cast against a candidate he shall be declared not elected.

Article 11.

Sec. 1. The number of members shall be limited to two hundred and thirty (230).

Sec. 4. Any member wishing to sell his membership shall have the right to do so, provided he has no unsettled contracts with or claim against him by any member of the Stock Exchange, for transactions arising in or relating to the business of banker or a stock or exchange broker; but, where the Arbitration Committee shall determine that any claims or contracts exist, the Governing Committee may, except in cases of insolvency, refuse to permit the membership to be sold, until such claims or contracts are, in its opinion, satisfactorily settled. The proceeds of the membership, if sold, shall, after deducting all charges due to the Exchange to be determined, in cases of controversy, by the Arbitration Committee, belong to its owner's creditors in the Exchange, in proportion to the amount of their respective claims, determined by the Arbitration Committee, as hereinbefore provided in Section 5, Article V, and be paid accordingly; and the remainder, if any, shall be paid to the owner.

Sec. 5. When a member dies, his membership shall, within one year thereafter, be sold or transferred; if, however, he be indebted to any member of the Stock Exchange, then, on the written request of two-thirds of the creditors in interest, said membership shall be sold, at the discretion of the Committee on Admissions, and the proceeds thereof, after deducting all charges due to the Exchange, to be determined in case of controversy by the Arbitration Committee, shall be paid to its owner's creditors who are members of the Exchange, in proportion to the amount of their respective claims, determined as hereinbefore provided in Section 5, Article V, as to disputes between living members; and the remainder, if any, shall be paid to the legal representatives of the deceased. The membership of a deceased member shall be liable for all dues and assessments which may be made by the Exchange from the day of his death until such time as his membership is transferred.

Sec. 8. Membership in the Exchange shall, ipso facto, terminate in either of the following cases:

1. Fraud in any transaction arising out of the member's business as a banker or broker.

2. Conviction, by a jury, of any infamous offense or felony. And the commission of the offense shall be ascertained in each case, after notice and opportunity for hearing, by a vote of two-thirds present (being a majority of the whole number) of the Governing Committee.

3. Suspension from the Stock Exchange for any cause, and inability for one year thereafter to comply with the constitution, by-laws and rules as to eligibility for reinstatement.

Sec. 9. Upon such termination of membership, the said membership shall be sold, at the discretion of the Governing Committee, and the proceeds, after deducting all charges due the Exchange and all debts due to creditors in the Exchange—which amounts shall be determined by the Arbitration Committee—shall be paid to the expelled member, his heirs or assigns.

Article 12.

Sec. 6. Any member who shall be declared a bankrupt shall, ipso facto, be suspended from the Stock Exchange; but a suspended member, presenting a certificate of discharge under the United States bankrupt law, becomes eligible under the rules for re-instating suspended members.

Sec. 7. If any suspended member fails to settle with all his creditors within six months from the time of his suspension, his membership may be disposed of by the Committee on Admissions, and must be sold at the end of twelve months; and the proceeds, after deducting all charges due to the Exchange to be determined, in cases of controversy, by the Arbitration Committee, shall

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belong and be paid to his creditors in the Exchange in accordance with Section 3.

Sec. 11. The proceeds arising from the sale of the membership of an insolvent shall be divided pro rata by the Arbitration Committee among the creditors recorded, as in Section 3, and if any balance remain it shall be paid over to the insolvent."

The by-laws do not contain any provision relating to membership or its transfer. The cases principally relied on by the bankrupt, in support of his contention that title to the seat or membership did not pass to the trustee, relate to the Philadelphia Stock Exchange, and are Thompson v. Adams, 93 Pa. 55, and Pancoast v. Gowen, 93 Pa. 66. The court, in the former case, said that "the seat is not property in the eye of the law, it could not be seized in execution for the debts of the members," and, in the latter, that "a seat in the board of brokers is not property subject to execution in any form." In Thompson v. Adams it appears that Richards took the legal title to a seat or membership in the exchange, Thompson furnishing to him the purchase money. Richards died indebted to sundry members of the exchange in amounts exceeding in the aggregate such purchase money, and was at the time of his death the only known owner, legal or equitable, of the seat. Nor had his creditors in the exchange any knowledge or notice that his seat had been paid for with the money of another. Pursuant to the provisions of the constitution the seat was sold by the secretary for a sum less than Richards' indebtedness to the members of the exchange, and the point to be determined was whether Thompson was entitled as against such creditors to the whole or any portion of the proceeds of sale. It was held that he was not; the constitution providing that when a member died his seat might be sold by the secretary and that the balance of the proceeds after satisfying the claims of the members of the board should be paid to his legal representatives. In Pancoast v. Gowen an attachment execution was issued on a judgment obtained by Pancoast against Houston and was served upon the members of the Philadelphia Stock Exchange as garnishees, who admitted that the defendant owned a seat in the exchange but averred that "at the service of this writ they held no property of any kind, attachable at the suit of the plaintiff, belonging to Joseph L. Houston, the seat belonging to him not being property, except between members of the Philadelphia Stock Exchange." It was held that the seat was not subject to the attachment execution. The points actually determined in these two cases do not support the unqualified dictum contained in one of them that "the seat is not property in the eye of the law." In Barclay v. Smith, 107 Ill. 349, it was held that a certificate of membership in the board of trade of the city of Chicago was not property liable to be subjected by a creditor's bill to the payment of the debts of the holder. The language of the court certainly went very far. Although the certificate of membership was "regarded in the market as worth $4,000," it was said that it did not come within any definition of property, and was not property at all, but a "mere privilege conferred upon the member." In Weaver v. Fisher, 110 Ill. 146, it was held, however, that a bill in chancery would lie to compel the surrender of a certificate of membership in the Chicago

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board of trade which had been procured with the complainant's money, but taken in the name of the defendant, who was her agent. The court, among other things, said:

"It is misapprehension to suppose, as counsel for plaintiff in error seem to, that we held in Barclay v. Smith, 107 Ill. 349, that there are no property rights of any kind in a certificate of membership in the board of trade of the city of Chicago. We simply there held that such a certificate is not property which is liable to be subjected to the payment of the debts of the holder by legal proceedings. * * * It can not be said, here, that we must, from the nature of this corporation, hold there can be no pecuniary value in a certificate of membership, because the proof shows the contrary with absolute certainty. It has a regular pecuniary market value, notwithstanding the conditions to which the transfer of its title is subject."

The material inquiry before us is, not whether the seat could have been attached or taken in execution, but whether it was not property which Page prior to his bankruptcy could have transferred. The bankrupt act vests in the trustee the title not only to the property of the bankrupt which prior to the filing of the petition "might have been levied upon and sold under judicial process against him," but, as has been stated, to property which prior to that time "he could by any means have transferred." The membership or seat of the bankrupt in the exchange certainly was of pecuniary value to him and, subject to the restrictions and limitations of the constitution, could have been transferred by him to another. Section 4 of article 11 provides that "any member wishing to sell his membership shall have the right to do so, provided he has no unsettled contracts with or claim against him by any member of the Stock Exchange, for transactions arising in or relating to the business of banker or a stock or exchange broker." It appears that the bankrupt had at the time of the adjudication no such unsettled contracts or claims against him, and that the value of his seat or membership amounted to a substantial sum of money. It is true that the approval of the proper authorities in the exchange was necessary to a valid transfer of the membership, and that, as such approval might or might not be withheld, this requirement might prevent a transfer to a given person. This contingency possibly affected the value of the seat for the purposes of sale, but, while restricting, did not destroy its transferability. The membership was more than a mere privilege. It was property vested in Page and transferable to any person meeting the approval of the exchange. On principle we perceive no reason why the seat of the bankrupt was not embraced in "property which prior to the filing of the petition he could by any means have transferred." We are aware that in the case of In re Sutherland, 23 Fed. Cas. 453 (No. 13,637), Judge Blodgett held that under the bankruptcy act of 1867 membership in the Chicago board of trade was not an asset which passed to an assignee in bankruptcy. The authorities to the contrary, however, are quite conclusive. Hyde v. Woods, 94 U. S. 523, 24 L. Ed. 264; In re Ketchum (D. C.) 1 Fed. 840; In re Warder (D. C.) 10 Fed. 275; In re Werder (C. C.) 15 Fed. 789; Sparhawk v. Yerkes, 142 U. S. 1, 12 Sup. Ct. 104, 35 L. Ed. 915.

The order of the court below under review is affirmed.

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(107 Fed. 101.)

In re ORMAN.

ADLER et al. v. LANE.

(Circuit Court of Appeals, Fifth Circuit. March 26, 1901.)

No. 941.

APPEAL—PETITION FOR REVIEW—DISMISSAL—COSTS.

Pending a petition in equity to the circuit court of appeals to superintend and revise a ruling of the court below overruling respondent's demurrer to a bill of complaint brought by a trustee in bankruptcy, the bill was voluntarily dismissed by complainant, on leave of court, without prejudice, and at his own cost. *Held*, that he should be required to pay the costs on the petition for review, dismissal of which was necessarily required by his action below.[1]

Petition for Revision of Proceedings of the District Court of the United States for the Northern District of Alabama, in Bankruptcy.

A. Latady, for the petition.

Lawrence Cooper, for respondent.

Before PARDEE and McCORMICK, Circuit Judges, and TOULMIN, District Judge.

PER CURIAM. This is a petition in equity to superintend and revise in a matter of law a ruling of the court below sitting in bankruptcy. Charles P. Lane, trustee in bankruptcy of William A. Orman, brought his bill of complaint against the said William A. Orman and his wife, Kate W. Orman, and one Morris Adler, seeking to have declared fraudulent and void a certain transfer of a contract of lease, and to have the said contract of lease declared to be the property of the bankrupt, William A. Orman. The respondents demurred to the jurisdiction of the court. The demurrer was overruled, and thereupon the judge of the lower court allowed this petition for revision, and, at the request of the petitioner, directed all further proceedings in that court to be suspended until the determination by this court of the question raised in the petition for review. After the record was filed in this court the complainant in the bill (defendant here) still pending in the lower court, on leave of the court, dismissed the same without prejudice and at his own cost. A copy of this judgment of dismissal has been filed here, accompanied by a motion to dismiss the petition for review on the ground, among others, that the suit pending in the bankruptcy court has been dismissed. The main suit having been dismissed in the court below, the question presented on this petition for review has become a moot question, and, as a matter of course, the petition for revision must be dismissed. The only question left for us is in regard to the costs in this court. As we understand the law, the petition for review in this case did not have the effect of a writ of error or an appeal from final judgment to remove the case to this court, and therefore the dismissal of the main

[1] Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.

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case was within the province of the lower court; and, as that action compels the dismissal of the case here, we think that the respondent (defendant in this court) should pay the costs. The petition is dismissed at the cost of the respondent, Charles P. Lane, trustee in bankruptcy of W. A. Orman.

(107 Fed. 106.)

UNITED STATES v. DODGE et al.

(Circuit Court of Appeals, Second Circuit. March 12, 1901.)

No. 94.

CUSTOMS DUTIES—ESSENTIAL OIL—WASTE—NONENUMERATED UNMANUFACTURED ARTICLE.

Camphor oil obtained in a crude state from the same tree as crude gum camphor, the two being united without chemical connection, and separated merely by drainage, is not dutiable as "essential oil," within Tariff Act 1894, par. 60, and Act 1897, par. 3, nor should it be classified as "waste," but the same is dutiable as a nonenumerated unmanufactured article.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decision reversing a decision of the board of general appraisers, which affirmed the action of the collector in the matter of the classification for customs duty of certain merchandise imported under the tariff acts of 1894 and 1897.

Charles D. Baker, for the United States.

Albert Comstock, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The collector classified the merchandise as an "essential oil," under paragraph 60, Act 1894:

"Products or preparations known as alkalies, alkaloids, distilled oils, rendered oils, and all combinations of the foregoing * * * not specially provided for in this act, 25 per centum ad valorem;" and under paragraph 3, Act 1897: "Alkalies, alkaloids, distilled oils, essential oils, expressed oils, rendered oils, and all combinations of the foregoing * * * not specially provided for in this act, 25 per centum ad valorem."

The board of appraisers found that it is "camphor oil, sometimes commercially known as heavy oil of camphor; and is a crude article, from which refined camphor oil is distilled. It is a distilled oil." The same substance was before this court in Dodge v. U. S., 28 C. C. A. 152, 84 Fed. 449, and is therein thus described:

"It comes from the same tree from which comes the crude camphor of commerce; the whitish, translucent, crystalline, volatile substance which is well known to every one as 'camphor' or 'gum camphor.' The article in question is a dark brown, heavy, oily liquid; and, as obtained from the tree, the crude gum camphor and this brown liquid are mixed together without any chemical connection. They are separated merely by drainage."

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We concur with the judge who heard the cause at circuit that it cannot fairly be classified under the paragraphs which the collector held applicable. The testimony is overwhelming and uncontradicted that it is not distilled, nor expressed, nor rendered oil, either in trade and commerce or in the common acceptation of these terms. The dictionary states that essential oils are either distilled or expressed, and the evidence shows without contradiction that it is not recognized as an essential oil in trade and commerce. In the former appeal cited supra we held that certain paragraphs under which the importers sought to classify it did not apply. It is now contended that it should be classified as "waste," or as a "nonenumerated unmanufactured article," at 10 per centum ad valorem. It would seem that it cannot fairly be called "waste,"—a word which presupposes some process of manufacture,—and, in our opinion, should be classified as a nonenumerated unmanufactured article. The decision of the circuit court is, to this extent, affirmed.

(107 Fed. 107.)

UNITED STATES v. HILLS BROS. CO.

(Circuit Court of Appeals, Second Circuit. February 7, 1901.)

No. 50.

CUSTOMS—SUGAR—BOUNTY.

Where, under Act 1897, § 5, providing that, when any country shall pay any bounty on the exportation of merchandise dutiable in this country, there shall be levied an additional duty equal to the bounty, Holland gives bounty for the production of sugar, to be deducted from the excise thereon, but such excise is remitted on exportation, the duty is a grant on the exportation, and should be added to the regular duty on importation of sugar from that country.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decision of the circuit court, Southern district of New York (99 Fed. 425), reversing a decision of the board of general appraisers which had affirmed the action of the collector of the port of New York in assessing a countervailing duty on certain sugar imported from Amsterdam under the tariff act of 1897. The facts are set forth in the opinion.

D. Frank Lloyd, for appellant.

Everit Brown, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The usual duty, under paragraph 209 of the act of July 24, 1897, was assessed on the sugar, and is not called in question. In addition there was assessed a countervailing duty of 2.12 Dutch florins per 100 kilograms, under section 5 of the said act, which reads as follows:

"Sec. 5. That whenever any country, dependency, or colony shall pay or bestow, directly or indirectly, any bounty or grant upon the exportation of any article or merchandise from such country, dependency or colony, and

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such article or merchandise is dutiable under the provisions of this act, then upon the importation of any such article or merchandise into the United States whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by re-manufacture or otherwise, there shall be levied and paid, in all such cases in addition to the duties otherwise imposed by this act, an additional duty equal to the net amount of such bounty or grant, however the same be paid or bestowed. The net amount of all such bounties or grants shall be from time to time ascertained, determined and declared by the secretary of the treasury, who shall make all needful regulations for the identification of such articles and merchandise and for the assessment and collection of such additional duties."

The sole question in the case is whether, under a certain law, which went into effect in the Netherlands September 1, 1897, and which contained regulations respecting the production of sugar, the government of that country did in fact pay or bestow, directly or indirectly, a bounty or grant upon the exportation of sugar from that country. The importer makes no question as to the amount of duty, or as to the regularity of the action of the secretary of the treasury, if it be held that such bounty is in fact paid in the Netherlands. The circuit court held that the bounty paid by the Netherlands government is a bounty upon production, and not a bounty upon exportation of the sugar, directly or indirectly. In this conclusion we are unable to concur. Without quoting the precise text of the various provisions of the Dutch law, it may be stated that it imposes on sugar (such as is here concerned), whether produced in or imported into Holland, an excise tax of 27 florins per 100 kilos. A so-called "deduction," which concededly is a bounty, or grant, or premium, is paid for the production of raw sugar of 2.50 florins per 100 kilos for the year in question, and for the production of refined sugar therefrom a further bounty of 0.34 florins per 100 kilos; a total of 2.84 per 100 kilos. The amount of such premium or bounty is placed to the credit of the person to whom it is due in his excise account; and it is provided that, if it "should cause the credit to exceed the debit, the difference shall be paid to the manufacturer or refiner from the revenue from the excise of the year from which the deduction takes place." In view of the great disparity between the bounty and the excise tax (there is a similar disparity for all kinds and grades of sugar), it is quite evident that there can be no excess "paid" from the government's revenues to any one who is liable for the excise tax. Finally, it is provided that sugar withdrawn for exportation to a foreign country, and actually exported, shall be exempt from the excise tax. That tax being thus eliminated from the debit side of the account, the manufacturer or refiner receives from the government the excess of credit over debit, which is the precise amount of the bounty. Undoubtedly, this premium or "deduction" is called a bounty on production, and is a bounty on production; but the other provisions of the law have the practical effect of making it, from the standpoint of other countries, a bounty on exportation. The result of the whole act is no different, so far as the foreign country is concerned, from what it would be had it provided: All sugar producers shall receive a bounty paid in cash

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from the revenues of the government of so much per 100 kilos. Those who export their sugar may keep this bounty, those who do not export it must forthwith return it to the government. The decision of the circuit court is reversed, and that of the board is affirmed.

(107 Fed. 109.)

UNITED STATES v. VOLKMANN et al.

(Circuit Court of Appeals, Second Circuit. February 7, 1901.)

No. 78.

CUSTOMS DUTIES—CHOCOLATE.

Under Act 1897, par. 281, providing for a duty on chocolate, and that "the weight and value of all coverings other than plain wooden, shall be included in the dutiable weight and value" thereof, the dutiable value of chocolate packed in tin boxes should be arrived at by adding the number of pounds of the chocolate and the tin coverings, and the outside wooden boxes in which it is packed for transit should not be included, pursuant to the method of estimating the value prescribed by section 19 of the customs administrative act of 1890, since the later statute plainly intends that the wooden coverings should be free from duty, and the interior coverings alone treated for duty purposes as if they were chocolate.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decision of the circuit court, Southern district of New York (99 Fed. 264), reversing a decision of the board of general appraisers which affirmed the action of the collector of the port of New York in the assessment of duties on merchandise imported by the appellees.

Chas. D. Baker, for appellant.

W. Wickham Smith, for appellee.

Before LACOMBE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The merchandise in question consists of chocolate and cocoa put up in small consumption packages,—half-pound tins or what not,—and packed for transit in outside wooden boxes. It is conceded by both sides that the provisions of paragraph 281 of the tariff act of 1897 are applicable. It reads as follows:

"Par. 281. Chocolate and cocoa prepared or manufactured not specially provided for in this act, valued at not over 15 cents per pound, 2½ cents per pound; valued above 15 cents and not above 24 cents per pound, 2½ cents, and not above 35 cents per pound, 5 cents per pound and 10 per centum ad valorem; valued above 35 cents per pound, 50 per centum ad valorem. The weight and value of all coverings other than plain wooden, shall be included in the dutiable weight and value of the foregoing merchandise; powdered cocoa, unsweetened, 5 cents per pound."

In order to determine in what class the chocolate should be assessed,—whether over or under 15 cents or 24 cents, etc.,—the collector added up the value of the chocolate, the inner packages, and the outside wooden cases, as the value would be estimated under

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section 19 of the customs administrative act of 1890, and divided the sum thus obtained by the weight of the chocolate alone. We concur with the circuit court in the conclusion that in so doing he disregarded the express instructions of the statute. The provision for coverings which is found in the customs administrative act does not apply to these articles, which are in the later statute specifically provided for, a part only of the value of the coverings being required to pay duty. The plain intent and the expressed meaning of the final sentence is that the plain wooden coverings shall be free from duty, but that the interior coverings shall be treated for duty purposes as if they were chocolate; the dutiable weight shall be the weight of chocolate plus inner coverings; and the dutiable value, the value of chocolate plus inner coverings. If this be so,—if, for example, the dutiable value of an importation of 2,200 pounds of chocolate and 240 pounds of inner coverings is $550, and is to be treated for duty purposes as if it were 2,440 pounds of chocolate,—the natural corollary would seem to be that the value per pound of this dutiable aggregate must be its total value divided by its total weight. The decision of the circuit court is affirmed.

(107 Fed. 110.)

EVANS v. COLLECTOR OF CUSTOMS OF PORT OF SAN FRANCISCO.

(Circuit Court of Appeals, Ninth Circuit. February 4, 1901.)

No. 626.

CUSTOMS DUTIES—CLASSIFICATION—ANTHRACITE COAL.

Anthracite coal, containing less than 92 per centum of fixed carbon, is within paragraph 415 of the tariff act of 1897, which imposes a duty on "coal, bituminous, and all coals containing less than 92 per centum of fixed carbon," and is not entitled to free entry under paragraph 523, in the free list, which includes "coal, anthracite, not specially provided for in this act."

Appeal from the Circuit Court of the United States for the Northern District of California.

Smith & Pringle, for appellant.

Marshall B. Woodworth, Asst. U. S. Atty. (Frank L. Coombs, U. S. Atty., of counsel), for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. The only question involved in this appeal is whether a cargo of anthracite coal containing less than 92 per centum of fixed carbon is subject to duty under the provisions of paragraph 415 of the tariff act of 1897, or whether it should be admitted free of duty under the provisions of paragraph 523 of said act. In Coles v. Collector, 40 C. C. A. 478, 100 Fed. 442, this identical question was presented to this court. It was ably argued, and received a careful and deliberate consideration. Our con-

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clusion was that the coal in question was subject to duty, and not entitled to be admitted free. Thereafter appellant petitioned this court for a rehearing, based principally upon the ground that, in the judgment of the petitioner, the reasons given and conclusions reached by the supreme court in Chew Hing Lung v. Wise, 176 U. S. 156, 20 Sup. Ct. 320, 44 L. Ed. 412, were adverse to the views expressed by this court in the Coles Case. That decision was carefully examined, with the result that, in our opinion, it did not sustain the contention of appellant's counsel, and was not in opposition to the conclusion reached by this court in the Coles Case. The petition for rehearing was therefore denied. Appellant then petitioned the supreme court for a writ of certiorari to review the decision of this court. In this application the attention of that court was called to the decision in Chew Hing Lung v. Wise, and it was claimed by petitioner that the opinion of this court was not in accord with the views therein expressed. The petition for the writ of certiorari was denied. 177 U. S. 695, 20 Sup. Ct. 1029, 44 L. Ed. 946. In the light of these facts, we respectfully decline to reconsider the same identical question, conscious of the fact that a rediscussion would result in the same conclusion arrived at by this court in the Coles Case. We adhere to the views therein expressed. The judgment of the circuit court is affirmed.

(107 Fed. 111.)

RACINE et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. February 27, 1901.)

No. 16.

CUSTOMS DUTIES—WATCHES.

Act 1897, par. 191, imposes specific and ad valorem duties on "watch movements, whether imported in cases or not," and then provides that "watch cases and parts of watches" shall pay 40 per cent. ad valorem. *Held*, that while such paragraph assumed that completed watches, including case and works, would sometimes be imported, it nevertheless imposed duties on the cases separately, and that they were not dutiable as an entirety, under the first half of such paragraph, as "watch movements in cases."

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decision of the circuit court, Southern district of New York, affirming a decision of the board of general appraisers (99 Fed. 557), which sustained the action of the collector of the port of New York in assessing certain imported merchandise for duty.

W. B. Coughtry, for appellants.

W. G. Thompson, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The importation was under the tariff act of 1897, paragraph 191 of which reads as follows:

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"Par. 191. Watch movements, whether imported in cases or not, if having not more than seven jewels, thirty-five cents each; if having more than seven jewels and not more than eleven jewels, fifty cents each; if having more than eleven jewels and not more than fifteen jewels, seventy-five cents each; if having more than fifteen jewels and not more than seventeen jewels, one dollar and twenty-five cents each; if having more than seventeen jewels, three dollars each, and in addition thereto, on all the foregoing, twenty-five per centum ad valorem; watch cases and parts of watches, including watch dials, chronometers, box or ship, and parts thereof, clocks and parts thereof, not otherwise provided for in this act, whether separately packed or otherwise, not composed wholly or in part of china, porcelain, parian, bisque, or earthenware, forty per centum ad valorem; all jewels for use in the manufacture of watches or clocks ten per centum ad valorem."

The articles imported were watches. The collector assessed a specific duty of from 35 cents to $3 each (according to the number of jewels), and 25 per cent. ad valorem additional thereto on the watch movements, and 40 per cent. ad valorem on the watch cases. The appellants claim that "watch movements in cases" are completed watches, and that in the absence of any specific designation of watches in the act of 1897 the article is dutiable as an entirety at 25 per cent. ad valorem, and a specific duty of from 35 cents to $3, according to the number of jewels in the watch. The plain grammatical construction of the first half of paragraph 191 is well paraphrased by the judge who heard the cause at circuit as follows:

"Watch movements, if having not more than seven jewels, thirty-five cents each," etc. "This paragraph shall apply to watch movements whether they are imported in cases or not."

We find no good reason for giving the paragraph any other than its grammatical construction. The word "watches" was one well known to congress. It had appeared in the earlier tariff acts. It was included in the second half of this paragraph, immediately before "watch cases," when the bill passed the house, but was dropped out of this act as finally passed. The natural conclusion is that congress decided not to lay any duty upon "watches" as such. If it had intended to include them in the first half of the paragraph, as appellants contend, it would surely have transposed the word "watches" from its position in the second half to one in the first half, and not have undertaken to substitute for the old and well-known name "watches" the awkward phrase "watch movements imported in cases." Moreover, it will be observed that the language of the first part of the paragraph, although assuming that complete watches would sometimes be imported, nevertheless imposes duties only upon the watch movements imported in the cases, and not upon the cases. Unless the cases pay duty under the second half of the paragraph, they will escape duty altogether, since there is nothing in the first half which lays either specific or ad valorem duty upon them. The decision of the circuit court is affirmed.

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(107 Fed. 113.)

MORRISON et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. February 5, 1901.)

No. 90.

CUSTOMS DUTIES—BEADED NET LACE.

Beaded net lace, made of silk, is subject to customs duty under Tariff Act 1894, par. 354, as manufactures known commercially as "bead, beaded, or jet trimmings or ornaments," at 35 per cent. ad valorem, and not under paragraph 301, at 50 per cent. ad valorem.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decision of the circuit court, Southern district of New York, affirming a decision of the board of general appraisers which sustained the collector of the port of New York in the assessment of duty on certain merchandise. The importations represented by the exhibit comprised various pieces of beaded net lace made of silk.

Albert Comstock, for appellants.

Chas. D. Baker, for appellee.

Before LACOMBE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The importations were under the tariff act of 1894. The relevant paragraphs are:

"Par. 301. Laces and articles made wholly or in part of lace, and embroideries, including articles or fabrics embroidered by hand or machinery, handkerchiefs, neck ruffilings, and ruchings, nettings and veilings, clothing ready made, and articles of wearing apparel of every description, including knit goods made up or manufactured wholly or in part by the tailor, seamstress, or manufacturer, composed of silk or of which silk is the component material of chief value, and beaded silk goods, not specially provided for in this act, fifty per centum ad valorem."

It was under this paragraph that the collector classified the goods.

"Par. 354. Manufactures of ivory, vegetable ivory, mother-of-pearl, gelatine and shell, or of which these substances or either of them is the component part of chief value, not specially provided for in this act, and manufactures known commercially as bead, beaded or jet trimmings or ornaments, thirty-five per centum ad valorem."

The importers contended that their goods should be classified under this section. It appears that the goods are in fact "used for making or trimming articles of women's wearing apparel." They are manifestly "beaded silk goods," and, if it appeared that there were no other goods of that description save such as are used for trimming, the last-quoted clause might be held to be the more specific, and the articles be classified under it. But it was stated on the argument that there are many other kinds of beaded silk goods never used for trimming, and the assertion was not disputed. Indeed, the court might fairly take notice of what it sees from day to day. The issue therefore lies between the "laces and articles made wholly or in part of lace" of the one paragraph and the "bead, beaded, or jet trimmings" of the other. The question is wholly one of

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fact, and is this: Are the articles in question known commercially as "bead, beaded, or jet trimmings"? More than a dozen witnesses were examined. The judge who heard the cause at circuit reached the conclusion from their testimony that the "merchandise is not so universally known as 'beaded or jet trimmings' as to give to said term the force of commercial designation." Evidently he was under the impression that the witnesses were in conflict with each other; some insisting that the articles were "beaded laces," and others that they were "beaded trimmings." This appearance of conflict is induced by the form of the questions put by counsel for the government. In reality, there is no substantial conflict between the witnesses. When referred to specifically so as to differentiate them from other beaded trimmings, the articles are known as "beaded lace." That is their invoice name. But they belong to a well-known family, of which beaded gimps, beaded galloons, beaded headings, beaded passamenteries, and many others are members; and that the beaded laces, like the other members of the family, are generically known commercially as "bead, beaded, or jet trimmings," seems to be abundantly established upon the proof. In view of this, and of the circumstance that the enumerations in paragraph 301 are qualified with the phrase "not specially provided for," etc., while the generic designation "bead, beaded, or jet trimmings" is not thus qualified, we are of the opinion that the importations should be classified under paragraph 354. The decision of the circuit court is reversed.

(105 Fed. 713.)

CHOATE v. HOOGSTRAAT et al.

(Circuit Court of Appeals, Seventh Circuit. January 21, 1901.)

No. 662.

1. PAYMENT—NECESSITY OF PLEADING.

   Evidence of payment is only admissible under a plea of payment which should be specific as to the amount paid. An allegation in an answer that defendant turned over to plaintiffs certain lumber, of a stated value, which was accepted in settlement and in full accord and satisfaction of another's debt, is not a plea of payment which authorizes the defendant to go into a general accounting, and to prove the value of the lumber so turned over, in order to show that the debt had been paid independently of the alleged accord and satisfaction.

2. TRUST—CONTRACT CREATING—LIABILITY OF TRUSTEE.

   Plaintiffs had manufactured a quantity of lumber for a lumber company under a contract that it should be delivered for shipment, as required by the company. Being behind in its payments, plaintiffs refused to make further deliveries without payment, and defendant entered into a contract by which he agreed to take charge of future deliveries, and pay the proceeds thereof to plaintiffs to apply on their claim. *Held*, that he occupied the position of a trustee under such agreement, and could not sell lumber delivered to him thereunder to a corporation of which he was president, and refuse to account for the proceeds on the ground that such corporation held some claim against plaintiffs or their debtor.

3. STATUTE OF FRAUDS—PROMISE TO ANSWER FOR DEBT OF ANOTHER—CONSIDERATION.

   A letter written by defendant to plaintiffs, in which he agreed to become responsible for the payment of a sum due plaintiffs on certain

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lumber sold by them to a third party if plaintiffs would deliver such lumber to the purchaser to enable him to fill his contracts, expresses a sufficient consideration to take it out of the statute of frauds of Wisconsin, which requires the writing to express a consideration.[1]

4. SAME—ORIGINAL OR COLLATERAL PROMISE.

Plaintiffs had manufactured a quantity of lumber for a lumber company, a portion of which still remained in their possession. A part of the price of such portion had been paid, and, the remainder being past due, plaintiffs refused to make any further deliveries to the company for shipment until it was paid. Defendant, who was president of a corporation which held an unrecorded mortgage on the lumber, given by the company, and also a member of a firm which was indorser on notes of the company, stated to plaintiffs orally that, if they would deliver the lumber, he would "go good" for what the company was shipping until he gave them further notice. *Held*, that under the Wisconsin rule that, "where the party promising has for his object some benefit and advantage accruing to himself, and on that consideration makes the promise," a finding by the jury, under instructions properly stating such rule, that defendant's promise was an original promise, which bound him to payment of the value of the lumber delivered in reliance thereon, would not be disturbed.

5. SAME—KNOWLEDGE OF PROMISE.

It is not essential to the validity of a promise to pay, which is in fact an original promise, based on a consideration of benefit to the promisor, although the payment will incidentally discharge the debt of another, that the promisee should have knowledge of the real consideration when the promise is made and acted upon.

In Error to the Circuit Court of the United States for the Eastern District of Wisconsin.

On October 17, 1893, the defendants in error, who were the plaintiffs below, and the firm of Brown & Robbins, contracted with the Fair Lumber Company, a corporation, by which the former sold to the latter, and agreed to manufacture for it, the lumber of certain specified grades contained in and to be manufactured from pine timber upon certain specified lands in the state of Michigan, at prices stated in the contract, namely, $10.50 per 1,000 feet for the lumber; the prices for the shingle and lath depending upon the grade specified. Four dollars per 1,000 feet was to be paid under the contract on the 5th day of each month for all lumber put in pile during the previous month, and the remaining $6.50 per 1,000 feet was to be paid on the 5th day of each month for all the lumber loaded and shipped during the preceding month; the lath and shingle shipped during that period to be paid for in full at that date. The manufacture of the lumber was to be completed on or before April 1, 1894, and the Fair Lumber Company agreed to make final settlement for the lumber, lath, and shingle manufactured under the contract on November 1, 1894. Brown & Robbins, on October 25, 1894, transferred their interest in the contract to the defendants in error, who thus became the sole owners of the interest of the parties of the first part therein. The lumber was manufactured and piled, as provided, on or before April 1, 1894, and prior to November 1, 1894, the Fair Lumber Company had paid the $4 per 1,000 feet specified in the contract. The lumber was to be and was piled in the yards of Brown & Robbins, at Robbins, Mich., and was to be and to remain in their possession, and to be delivered upon demand of the Fair Lumber Company at its planing mill, or upon cars for shipment. The lumber was to be insured by the Fair Lumber Company, loss payable to the other parties to the contract as their interest should appear, and the policies delivered to them. The contract provided further: "If, when said stock is reduced to one million feet, or thereabouts, and the parties of the first part feel themselves insecure, they may demand security before said lumber is shipped; or, in case of financial failure of said second party, the lumber

[1] See note at end of case.

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remaining unshipped shall revert to said first party as their own to the amount in full of their claim." On November 9, 1894, the Fair Lumber Company was owing about $4,000 for lumber delivered to it in October preceding and about $27,600 for the lumber then in the possession of the defendants in error. The latter had forbidden further shipments of lumber without payment or security for the debt due them upon the lumber. Thereupon, on that day, the Fair Lumber Company settled for the balance due for the October shipments, partly in cash and partly by acceptances, which were afterwards paid; and with respect to the balance of $27,600 the president of the Fair Lumber Company at Robbins, Mich., suggested to the defendants in error that they should all go to Oshkosh, where Mr. Leander Choate, the plaintiff in error, resided, and make some arrangement by which shipments would be permitted, and the delivery of the lumber continued upon Mr. Choate's becoming security for the Fair Lumber Company. The parties accordingly proceeded to Oshkosh, and met with Mr. Choate. The latter was president of the Oshkosh Log & Lumber Company, which was a creditor of the Fair Lumber Company to the amount of from ten to twelve thousand dollars. He was also a member of the firm of Bray & Choate, which firm was indorser upon the paper of the Fair Lumber Company to the amount of from six to seven thousand dollars. The Oshkosh Log & Lumber Company had also a bill of sale, never placed upon file, of the factory plank in the stock manufactured by the defendants in error. On September 13, 1894, the Fair Lumber Company had sold to the Williamson & Libbey Lumber Company, of Oshkosh, all of the factory plank in this stock of lumber, of which fact Choate had been informed prior to the interview of November 9, 1894. At this interview Mr. Choate declined to go security for the debt of the Fair Lumber Company, stating that Fair had misrepresented his indebtedness, and that the lumber company was owing him enough. Then, according to the testimony for the defendants in error, they said to him that, if he would not go security, they would stop Fair from shipping, to which he replied, "If you do, you will bust the poor fellow," and one of the defendants in error answered, "If we don't stop him, he will bust us," and that Mr. Choate replied that he was in a hurry to attend a funeral; that he had not made up his mind just then about going on this paper, but said, "I will write you, and until that time I will go good for what they are shipping." This part of the conversation was denied by Mr. Choate. The defendants in error claim that they, upon the faith of Mr. Choate's promise, permitted the Fair Lumber Company to ship the lumber until the 13th day of November, 1894, the date of a letter received from Mr. Choate. The amount of lumber so shipped, with interest, amounted to $1,922.72, part of the verdict in this cause. Mr. Choate testified, somewhat obscurely, that by the bill of sale, which was not produced, the Fair Lumber Company turned over to the Oshkosh Log & Lumber Company, of which he was president, the factory plank in the stock manufactured by the defendants in error; that he could not say that his company received all the proceeds of the factory plank shipped during November, but might have got a little something. On November 13, 1894, Mr. Choate wrote to the defendants in error the following letter:

"Gentlemen: I have just been talking with Mr. Fair, but have come to no settlement yet. I told him I should write you to that effect. He wanted me to write you that, if you would let him ship what few orders he had, he would stop shipping. It would hurt his trade if it should be reported that he had been stopped from shipping. I will become responsible for the $6.50, the amount of your claim on factory plank.

"Yours sincerely, Leander Choate."

The defendants in error claimed that they accepted the written agreement, and permitted shipments between the 14th and the 20th of November to the amount, with interest, of $839.08; also part of the verdict. On the 20th day of November an agreement in writing was perfected between all the parties, by which Fair agreed to transfer his stock and procure the election of Choate and Daly as directors of the Fair Lumber Company, and to place the general management of its business in the hands of Mr. Choate, who agreed to take the management and turn over to the defendants in error all moneys arising

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from the sale of the stock at Robbins as fast as received by him, until their claim against the Fair Lumber Company was paid in full, if the moneys received from the sale of the stock should prove sufficient therefor. The defendants in error agreed to waive the strict terms of the contract of the 17th of October, 1893, and agreed that Mr. Choate should have the necessary time to realize from the stock of lumber, and that the time of the payment of the amount due them November 1, 1894, under the contract, should be extended, and payment should be made monthly for all lumber disposed of during the previous month, and the full amount of receipts for the lumber should go to them until their debt was satisfied. Under this latter arrangement Mr. Choate remitted to the defendants in error from time to time the proceeds of sales and shipments, except the sum of $243.59, for lumber sold by him to the Oshkosh Log & Lumber Company, claiming that that company refused to pay the amount under some claim of offset against the Fair Lumber Company, or the defendants in error. In May, 1895, Mr. Choate declined to act further under that contract, and turned over to the defendants in error the lumber then on hand. They received it from Choate, and afterwards sold it. The suit was brought to recover (1) upon the alleged oral promise of Choate of November 9, 1894, for the property claimed to have been delivered on the faith of that promise; (2) upon the written promise of November 13, 1894, for the property claimed to have been delivered under that promise; (3) to recover the sum of $243.59 under the written contract of November 20, 1894. The defendant below denied (1) the alleged promise of November 9, 1894, and also charged that such alleged agreement was void under the statute of frauds; (2) nonacceptance by the defendants in error of the promise contained in the letter of November 13, 1894, and a denial that it was ever acted upon, or that the writing expressed any consideration as required by the statute of frauds; (3) as to the sum of $243.59 for lumber sold by him to the Oshkosh Log & Lumber Company, he denies that he had received that amount from the company, and charges that the defendants in error here and the Fair Lumber Company were both indebted to the Oshkosh Log & Lumber Company in a sum in excess of such bill of lumber, and that that company retained the sum, and refused to pay the same. He lastly alleges "that after the making of the agreement of November 20, 1894, and about May 18, 1895, and in final settlement thereof, he turned back to the said plaintiffs, and they accepted, about $19,232.70 worth of lumber, then in the yards of the plaintiffs, in settlement and payment of their claim and demand against the Fair Lumber Company, and that the said lumber was by them accepted and retained by the said plaintiffs, and was in settlement and payment of all claims and demands due from the Fair Lumber Company to them; and that the said lumber was then and there reasonably worth the sum of $19,232.70, which was more than there was then due or owing on the contract between the plaintiffs and the Fair Lumber Company, and that the said contract and all demands and claims arising thereunder were thereby duly settled, and accord and satisfaction thereof had."

At the trial, evidence was taken pro and con upon the subject of the making of the alleged oral promise of November 9, 1894, of the acceptance of the written promise of November 13, 1894, and touching the transactions under the contract of November 20, 1894. The defendant sought to show the total shipments of lumber from the beginning of shipments under the contract down to and including the turning over of the balance of the lumber on May 18, 1895, which included shipments made by the defendant Choate, for the purpose of proving that the debt of the Fair Lumber Company to the defendants in error had been fully paid. This evidence was excluded by the court, and its ruling is the subject of an exception. The court charged the jury with respect to the item of $243.59 that it represented lumber sold by Mr. Choate under the contract of November 20, 1894, to the Oshkosh Log & Lumber Company, of which he (Mr. Choate) was president, and for which amount he had failed to respond to the plaintiffs below, alleging that the Oshkosh Log & Lumber Company refused to pay him that amount under claim of offset against the plaintiffs below, or the Fair Lumber Company; that Mr. Choate, with reference to that transaction, occupied the position of a trustee to the plaintiffs and that he had no right to withhold that amount.

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With reference to the alleged verbal promise of November 9th the court charged as follows: "It is the law of this state, derived from ancient law in the statute of frauds, as it is called, that a promise made to answer for the debt, default, or miscarriage of another party is void, cannot be enforced, except it conform to the statute, be in writing, and express a consideration. Therefore this promise, or alleged promise, made on the 9th of November, gave the plaintiffs no right, if it was a mere guaranty,—a mere promise to answer for the debt of another. You will ascertain, gentlemen, whether any such promise was made in fact. Mr. Hoogstraat and Mr. Joyce testified that after their meeting in the office of the Fair Lumber Company, and while they were leaving the building, on some preliminary remarks by them that they would have to stop shipments, Mr. Choate said we would 'bust the boys,' or 'bust the Fair Lumber Company,' and they said, 'If we do not do it, it will bust us;' and that Mr. Choate then said, in substance, 'I will go good for the lumber they are shipping if you will let the shipments go on.' This was denied by the defendant. The plaintiffs must first establish by the preponderance of the testimony that such a promise was made. I think the only additional testimony was that of the bookkeeper, who was in the office only, so that substantially upon that point it is the testimony of Mr. Hoogstraat and Mr. Joyce on the one side and Mr. Choate on the other. Now the fact that there are two witnesses on the one side and but one on the other is not of itself necessarily the preponderance of the testimony. You have the right to consider the appearance of the witnesses, the reasonableness of the story, and all the circumstances, and determine for yourselves on the testimony which is the more credible testimony; and wherever you find the preponderance to be, you should determine accordingly by your verdict. If you find that the promise was not made, then, of course, you have nothing further to do with that question, and reject it from consideration. But, if you find the promise was made, then you must ascertain whether it is a promise within the prohibition of this statute of frauds; whether it is a promise to guaranty the amount,—to answer for the debt or default of another; and, if it is clearly such a promise, then it is of no effect, and entitled to no consideration. You are, however, to consider all the circumstances in this case for the purpose of ascertaining whether or not it is such a promise, for you are further instructed, gentlemen, that if you find from the preponderance of the evidence that the plaintiffs intended at the time of that promise on the 9th of November to prevent the Fair Lumber Company from shipping out lumber, and so informed the defendant, and then, in order to induce the plaintiffs to permit such shipments, and by reason of an interest in having the shipments go on, he promised to 'go good' for what the Fair Lumber Company were shipping; and you further believe that the plaintiffs understood the promise to be so intended and made because of an interest, and not gratuitously, and that the plaintiffs, relying on such promise, took no further action to prevent such shipments, but permitted the same to go on,—such promise by the defendant, under the undisputed facts in this case of his relations to the Oshkosh Log & Lumber Company and the Fair Lumber Company, would be an original undertaking on his part, and valid in the law as an original promise, and not a promise to answer for the debt, default, or miscarriage of another." The court, upon this question, further instructed the jury: "The fact that Mr. Choate had an interest in the lumber, or in the dealings of the Fair Lumber Company, through a bill of sale or chattel mortgage, whether it was actually put to use or not, and the fact that he was interested as a creditor to a large amount, would make a foundation for such a promise as an original undertaking; but these facts alone would not make a promise good, because it must be understood by these plaintiffs in taking the promise that it was so made because of an interest he had. They must understand it is not made simply out of a desire to help the Fair Lumber Company. If so made, or if so understood by the parties, that Mr. Choate had an actual interest in obtaining the shipments to be made, and that he made the promise on the strength of that, and for the purpose of causing the shipments to be made, then it is an original undertaking, and does not come within the statute. * * * That is the test upon which you will determine whether it is an original undertaking or a mere promise to answer

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for the debt of another." With respect to the claim under the letter of November 13th and its acceptance, the court charged the jury as follows: "You are instructed that this letter contained a sufficient statement of the consideration within the requirements of law to make it a valid promise; and if you find that the plaintiffs intended to accept and did accept the promise contained in this letter by their failure to forbid shipments in reliance thereon, and that the defendant understood and had reason to understand from the conduct of the plaintiffs that such promise was so accepted and acted upon by them for the shipments of factory plank from November 14th to November 20th, inclusive, you should find for the plaintiffs for the amount so shipped. In determining this question of acceptance, you should take into consideration the conduct of the parties throughout. You should take into consideration, for such value as you may find it to afford, the fact that the plaintiffs, immediately after the receipt of the letter, or soon after the receipt of the letter, went with their attorney to see Mr. Fair, the president of the Fair Lumber Company, and followed that up by going to Oshkosh, and there entered into the agreement of November 20th, by which the defendant was thereafter to take charge of the business of the Fair Lumber Company. Consider all those circumstances in connection with the situation of the plaintiffs; that meantime they had made no change in their conduct in relation to the shipments of lumber, but permitted the shipments to go on; and ascertain what was the real understanding of the parties,—whether the letter of November 13th was accepted or not, and so understood by both parties. Unless it was accepted, and so understood, or unless the parties had reason to understand that it was accepted, then it is of no avail to the plaintiffs in this case. There must be an acceptance, as well as a making of the promise." To reverse a verdict in favor of the plaintiffs below, this writ of error is sued out, the questions considered being properly assigned for error.

A. E. Thompson, for plaintiff in error.

W. H. Timlin, for defendants in error.

Before WOODS, JENKINS, and GROSSCUP, Circuit Judges.

JENKINS, Circuit Judge, after the foregoing statement, delivered the opinion of the court.

We are of opinion that the court below properly excluded the evidence offered for the purpose of showing that the debt of the Fair Lumber Company to the defendants in error had been fully paid, and this because no plea of payment had been made. The plea was one of accord and satisfaction,—that the defendants in error in May, 1895, in final settlement of the agreement of November 20, 1894, received from the plaintiff in error and accepted $19,232.70 worth of lumber in settlement and payment of their claim and demand against the Fair Lumber Company. The evidence failed to sustain this plea, the evidence of Mr. Choate showing no accord and satisfaction, but that the lumber remaining unsold in May, 1895, was merely turned over to the defendants in error; nothing being said about price, or of its being in satisfaction of any claim. The attempt was made by an estimate of the value of the lumber so turned over and by means of a general accounting to show that the debt of the Fair Lumber Company to the defendants in error had been paid, but, in the absence of any plea to that effect, the evidence was clearly improper. Such a plea should be specific as to the amount paid. Shipman v. State, 43 Wis. 381. Here the receiving of the lumber from Choate, the trustee, because he refused to further continue in the sale of it, with no agreement as to its value, or the application of its value to the debt of the Fair Lumber Company, did not make

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the value of it payment to that amount upon the debt of the Fair Lumber Company. Only when the defendants in error should dispose of that lumber could they be charged therewith, and then only the sale being fair, for the amount received. So, also, we think the court correct in charging the jury that the plaintiff in error was liable for the sum of $243.59, the lumber sold to the Oshkosh Log & Lumber Company, of which he was president. This amount had not been paid to Mr. Choate under some claim of the lumber company, as he stated, that it had some offset or defense as against the defendants in error or the Fair Lumber Company. The lumber was placed in the possession of Mr. Choate as trustee for the defendants in error. He obligated himself to turn over to them the proceeds. He was a trustee, and could not sell lumber to a company of which he was president, and assert any sort of a claim on the part of that company against the defendants in error or the Fair Lumber Company.

With regard to the question of the acceptance of the agreement of November 13, 1894, we think the matter was properly and fairly submitted to the jury. The question of acceptance is one of fact to be determined in the light of the surrounding circumstances; and, having been properly submitted, we are concluded by the verdict of the jury. We cannot doubt that the agreement expresses a consideration. It is, in legal effect, that the plaintiff in error would become responsible for the $6.50 per 1,000 feet, the amount of the claim of the defendants in error on factory plank, if they would allow Mr. Fair to ship lumber to fill the orders he then had. Assuming this letter to be a collateral agreement to answer for the debt of another, we think there is a sufficient statement of consideration to meet the requirements of the statute of frauds.

The question of most difficulty in this case arises upon the oral promise of November 9, 1894, found by the jury to have been made, to the effect that, if the defendants in error would permit the Fair Lumber Company to continue shipping, he (Choate) would, until he wrote them, as he promised to do, "go good for what they are shipping." The validity of this agreement depends upon the question whether it is a collateral agreement to answer for the debt of another, or whether it is an original agreement upon a new and sufficient consideration; the extinguishment in whole or in part of the original debt by the performance of the new agreement being merely an incident. Much subtlety has been indulged by the courts from an early date in the construction placed upon the statute of frauds. It would be difficult, if not impossible, to reconcile the various decisions of the courts. It is, perhaps, unfortunate that we have gotten away from the strict letter of the statute. We are glad to note the present tendency of the courts to get more in harmony with the spirit and the purpose of the law. It would serve no useful purpose to enter upon a review of the many and possibly discordant decisions. It is sufficient to state the rule, as we understand it to be, now held by the supreme court of the state of Wisconsin, whose law we are considering, and of other states which are in accord with that holding, and of the supreme court of the United States. In Hoile v.

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Bailey, 58 Wis. 434, 17 N. W. 322, and in Weisel v. Spence, 59 Wis. 301, 18 N. W. 165, the court reviews the previous decisions in that state, and furnishes, as a test to determine whether a promise is original or collateral, the following rule: "In all these cases founded on a new and original consideration of benefit to the defendant or harm to the plaintiff, moving to the party making the promise, either from the plaintiff or original debtor, the subsisting liability of the original debtor is no objection to a recovery;" and "where the party promising has for his object some benefit and advantage accruing to himself, and on that consideration makes the promise, this distinguishes the case of an original undertaking from one within the statute." The latter rule is in substance declared by the supreme court of Massachusetts in Curtis v. Brown, 5 Cush. 491. "It is not enough," says the court, "that the plaintiff has relinquished an advantage or given up a lien in consequence of the defendant's promise, if that advantage has not also inured to the benefit of the defendant, so as, in effect, to make it a purchase by the defendant of the plaintiff. * * * Where the plaintiff, in consideration of the promise, has relinquished some lien, benefit, or advantage for securing or recovering his debt, and where, by means of such relinquishment, the same interest or advantage has inured to the benefit of the defendant," an oral promise is binding. "In such cases, although the result is that the payment of the debt of the third person is effected, it is so incidentally and indirectly; and the substance of the contract is the purchase by the defendant of the plaintiff of the lien, right, or benefit in question." In White v. Rintoul, 108 N. Y. 222, 15 N. E. 318, the court states that the rule in Leonard v. Vredenburgh, 8 Johns. 29, that a new and original consideration moving between parties to the new promise took it out of the statute, was "dangerously broad, and capable of grave misapprehension," and that the rule of the state of New York now was that, "when the primary debt subsists, and was antecedently contracted, the promise to pay it is original when it is founded on a new consideration moving to the promisor and beneficial to him, and such that the promisor thereby comes under an independent duty of payment, irrespective of the liability of the principal debtor." In Emerson v. Slater, 22 How. 28, 16 L. Ed. 360, the supreme court of the United States declared that, "whenever the main purpose and object of the promise is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability." And in Davis v. Patrick, 141 U. S. 479, 12 Sup. Ct. 58, 35 L. Ed. 826, the court observes that "there is a marked difference between a promise which, without any interest in the subject-matter of the promise in the promisor, is purely collateral to the obligation of a third party, and that which, though operating upon the debt of third party, is also and mainly for the benefit of the promisor." We need not inquire whether these cases in the supreme court of the United States are fully in accord

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with the advanced rule declared by the supreme court of Wisconsin and Massachusetts and the court of appeals of the state of New York; nor need we suggest that logically and rationally damage to the promisee should be as effective as benefit to the promisor in determining whether a promise is original or collateral. It is enough to say that the question was submitted to the jury by the court below under the more advanced rule referred to, and certainly the plaintiff in error has no ground for complaint. The court distinctly told the jury that the facts that Choate had an interest in the lumber through a bill of sale, and that he was interested as a creditor, would not alone make his promise good, "because it must be understood by these plaintiffs in taking the promise that it was so made because of an interest he had. They must understand that it is not made simply out of a desire to help the Fair Lumber Company. If so made, or if so understood by the parties, that Mr. Choate had an actual interest in obtaining the shipments to be made, and that he made the promise on the strength of that, and for the purpose of causing the shipments to be made, then it is an original undertaking, and does not come within the statute." We are inclined to the opinion that the court went beyond the rule in declaring that the promisee must understand that the promise was not made simply out of a desire to help the debtor. We read no such requirement in the rule as stated. The fact must exist that the promise is made with a view to benefit the promisor, and because of his interest in the subject-matter, but we do not find that it is essential that the promisee should know of the interest and object of the promisor if the interest and purpose in fact existed; but this error—if error there was—was favorable to the plaintiff in error, and he cannot be heard to complain of it.

We cannot say, as a matter of law, that this promise was collateral. The situation was this: The defendants in error were in possession of the stock of lumber on account of which the Fair Lumber Company had paid $4.50 per 1,000 feet, and owed under their contract $6.50 per 1,000 feet in addition. That debt was due. The defendants in error could not be compelled to part with possession of that property until the whole debt was discharged, and they had refused to make delivery because of nonpayment of the debt. At this time the company of which Mr. Choate was president had a bill of sale of this lumber from the Fair Lumber Company. It had not been placed on record, and therefore was not effective as against a third party, but it was potential as between the Fair Lumber Company and Mr. Choate and his lumber company. He or his company was the legal owner of this lumber, subject to the claim and possessory lien of the defendants in error, and, as against the Fair Lumber Company, had the legal title to the lumber, and the right of possession for the purpose for which it was transferred. Notwithstanding the lumber had been sold to the Williamson & Libbey Company, and the bill of sale to Mr. Choate's company was ineffectual as against that purchase, still, as against the Fair Lumber Company, it gave Mr. Choate's company the right to the possession of the proceeds of the sale. Mr. Choate was also a member of the firm of Bray &

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Choate, which firm was indorser to the amount of $7,000 on paper of the Fair Lumber Company. Under these circumstances he orally agreed with the defendants in error that, if they would permit shipments of the lumber by the Fair Lumber Company, and waive their lien upon or possessory right to that lumber, he would, until such time as he should write the defendants of his final conclusion, "go good for what they are shipping." It will be observed that he did not promise to pay the debt of the Fair Lumber Company, amounting to $27,600; nor did he promise to pay only the amount of $6.50 per 1,000 feet for such lumber as should be shipped under the oral agreement. He did promise to "go good" for such lumber as should be shipped under that agreement, and that promise we understand to be an agreement to be responsible to and to pay the defendants in error the value of such lumber as they should permit to be shipped under that agreement, and that irrespective of the debt of the Fair Lumber Company upon that quantum of lumber, and irrespective of the total indebtedness. It is at least doubtful whether this promise, if so properly construed, is not an original promise; whether it had relation to the debt of the Fair Lumber Company to the defendants in error; and whether it was not a promise for the payment of the value of the lumber shipped, without reference to any debt from another. Chandler v. Davidson, 6 Blackf. 367; Lessel v. Zillmer, 105 Wis. 334, 81 N. W. 403. Nor are we able to say, as matter of law, under the circumstances stated, and in view of Mr. Choate's evidence with regard to the receipt of the proceeds of the lumber by his company, that his promise was not made upon "a new consideration moving to the promisor, and beneficial to him," and that his "leading object" was not to benefit himself. These were questions proper to be submitted to the jury, and were so submitted under instructions most beneficial to the plaintiff in error, and we cannot disturb the verdict. The judgment is affirmed.

NOTE.

Sufficiency of Expression of Consideration in Memorandum within Statute of Frauds.

1. "For Value Received."

[a] The words "for value received," contained in a written guaranty, express the consideration sufficiently to satisfy the statute of frauds.

—(Ala. Sup. 1896) Flowers v. Steiner, 108 Ala. 440, 19 South. 321;
(Del. Super. 1832) Brooks v. Morgan, 1 Har. 123;
(Md. App. 1888) Emerson v. C. Aultman & Co., 69 Md. 125, 14 Atl. 671;
(Minn. Sup. 1885) D. M. Osborne & Co. v. Baker, 34 Minn. 307, 25 N. W. 606, 57 Am. Rep. 55;
(N. Y. Sup. 1838) Watson v. McLaren, 19 Wend. 557; (1840) Douglass v. Howland, 24 Wend. 35; (1856) Cooper v. Dedrick, 22 Barb. 516; (1894) Smith v. Northrup, 29 N. Y. Supp. 851, 80 Hun, 65; (App. 1861) Miller v. Cook, 23 N. Y. 495, 22 How. Prac. 66; (1866) Mosher v. Hotchkiss, 3 Abb. Dec. 326;
(S. C. Sup. 1820) Caldwell v. McKain, 2 Nott & McC. 555; (1830) McMorris v. Herndon, 2 Bailey, 56, 21 Am. Dec. 515; (1837) Woodward v. Pickett, Dud. Law, 30;
(Wis. Sup. 1855) Day v. Elmore, 4 Wis. 190; (1878) Dahlman v. Hammel, 45 Wis. 466.

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[b] The words "for value received," in a contract, sufficiently express the consideration within the requirement of the statute of frauds.
—(Md. App. 1847) Edelen v. Gough, 5 Gill, 103;
(N. Y. Super. 1862) Howard v. Holbrook, 22 N. Y. Super. Ct. 237;
(Wis. Sup. 1859) Cheney v. Cook, 7 Wis. 413.

[c] (Ala. Sup. 1898) The words "for value received," in a note, express a consideration sufficient to satisfy the statute of frauds.—Booth v. Fire-Engine Co., 24 South. 405.

[d] (S. C. Sup. 1820) An unsealed instrument of writing in the form of a penal bond, whereby A. and B. acknowledge themselves held and firmly bound in a certain sum for value received, with a condition that the obligation should be void if the obligors should pay half of a debt due by B. and C., is not void, under the statute of frauds, as being a mere nude promise to pay the debt of a third person, but is founded on a sufficient consideration, which appears in the writing.—Aikin v. Duren, 2 Nott & McC. 370.

2. Effect of Seal.

[a] The presence of a seal is sufficient recital of consideration to satisfy the statute of frauds.
—(Ind. Sup. 1844) Gregory v. Logan, 7 Blackf. 112;
(Or. Sup. 1893) Johnston v. Wadsworth, 24 Or. 494, 34 Pac. 13.

[b] (N. Y.) Where an instrument of guaranty is under seal, this expresses sufficient consideration to be deemed a compliance with the statute requiring it to be expressed.—(Sup. 1840) Douglass v. Howland, 24 Wend. 35; (1894) Smith v. Northrup, 29 N. Y. Supp. 851, 80 Hun, 65; (Super. 1859) McKensie v. Farrell, 17 N. Y. Super. Ct. 192; (Com. Pl. 1854) Rosenbaum v. Gunter, 2 E. D. Smith, 415.

3. Agreements in Consideration of Marriage.

[a] (Minn. Sup. 1896) A writing as follows: "I, the undersigned, herewith promise to pay to the Widow M. G., on the wedding day, when she shall become my wife, the sum of $1,000,"—did not express the consideration for its execution with reasonable clearness, within Gen. St. 1894, § 4209.—Siemers v. Siemers, 65 Minn. 104, 67 N. W. 802, 60 Am. St. Rep. 430.

4. Agreements to Answer for Debt of Another.

[a] (Md. App. 1878) While the statute of frauds requires that the written contract of guaranty shall show the consideration on which it rests, it is not necessary that the consideration be stated in express terms. It is sufficient if it can be collected or implied with certainty from the instrument itself.—Ordeman v. Lawson, 49 Md. 135;
(Minn. Sup. 1874) Sewing-Machine Co. v. Schnell, 20 Minn. 40 (Gil. 33);
(N. H. Sup. 1858) Simons v. Steele, 36 N. H. 73;
(N. J. Sup. 1845) Laing v. Lee, 20 N. J. Law, 337.

[b] (Ala. Sup. 1881) A mortgage executed by one person to secure the debt of another, containing an obligation that the mortgagee will insure the mortgaged premises for two years, fulfills the requirements of Code 1876, § 2121, that the consideration shall be expressed in writing.—Moog v. Strang, 69 Ala. 98.

[c] (Ala. Sup. 1898) A bond for the costs of an election contest is not void, under the statute of frauds, though it does not in terms express the consideration, when it shows that the consideration was the institution of the contest.—McDonald v. Wood, 24 South. 86.

[d] (Me. Sup. 1851) Where A. gave B. a writing in these words, "I will be responsible to B. to pay a note [describing it as being the note of C.], my responsibility to be the same as if I signed the note, and will not require notice of its nonpayment," it was held that the writing did not, of itself, or in connection with the note, import a consideration for the agreement of A. —Cutler v. Everett, 33 Me. 201.

[e] (Md. App. 1867) A guaranty in these words: "I hereby hold myself responsible to A. and B. to the amount of $2,000 for any drafts they have accepted, or may hereafter accept, for L. Witness my hand this 16th of

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May, 1860. [Signed] H.,"—sets forth a sufficient consideration, as to subsequent acceptances, to satisfy the statute of frauds; the liability of the acceptors to suffer loss being a good consideration.—Hutton v. Padgett, 26 Md. 228.

[f] (Md. App. 1877) A written guaranty reading: "We, the undersigned, take pleasure in recommending S. to D. We also severally agree to become responsible for $350 to said D., to be forthcoming in thirty days after the final delivery of the work,"—does not sufficiently set forth the consideration thereof to satisfy the statute of frauds.—Deutsch v. Bond, 46 Md. 164.

[g] (Mass. Sup. 1813) A written promise by A. to B. that if B. will delay the service of an execution against C. until a certain date, A. will pay the amount of the execution, if not paid on that date by C., sufficiently complies with the statute of frauds, without reciting a promise by B. to so delay service of the execution.—Lent v. Padelford, 10 Mass. 230, 6 Am. Dec. 119.

[h] (Minn. Sup. 1895) A letter by which defendant requested plaintiff to sell goods to a third person, and agreed that he would "see them paid for," sufficiently expresses the consideration for the guaranty to satisfy the statute of frauds.—Straight v. Wight, 60 Minn. 515, 63 N. W. 105.

[i] (Mont. Sup. 1879) An appellant's attorney by letter directed the clerk of the district court to complete the transcript by a specified time, so that it might be used for certain purposes by the client, and therein guarantied payment of the clerk's fees by him. *Held*, that the letter was a sufficient memorandum "expressing the consideration," within Cod. St. p. 393, § 12.—O'Bannon v. Chumasero, 3 Mont. 419.

[j] (N. J. Sup. 1845) Where one of the creditors of a merchant writes to another, informing him that he (the writer) has, to protect himself and the other creditors and to save the stock from going into the bankruptcy court, purchased the stock of the debtor, and intends to close it out as rapidly and with as little expense as possible "for the benefit of the creditors," and says, "You may consider me as security or indorser" for the amount owing by the debtor, the consideration for the promise of security sufficiently appears.—Laing v. Lee, 20 N. J. Law, 337.

[k] (N. Y. App. 1850) As a promise to do an act in consideration of some act to be done by the promisee implies a request, if an agreement of guaranty made in this manner be in writing, there is a sufficient setting forth of the consideration to satisfy the requirements of the statute of frauds.—Bank v. Coster's Ex'rs, 3 N. Y. 203.

[l] (N. Y. App. 1855) A letter saying, "I will be responsible for what stock M. has had or may want hereafter, to the amount of $500," sufficiently expresses the consideration, within the statute of frauds.—Gates v. McKee, 13 N. Y. 232, 64 Am. Dec. 545.

[m] (N. Y. Sup. 1833) Where a party by a written instrument acknowledges to have received the deed conveying to a third person land to be paid for in a specified manner, and at the foot of the instrument promises to see the contract fulfilled, the consideration for such promise sufficiently appears to take the agreement without the statute; and where the deed is executed to enable the grantee to compromise with persons in possession, and the grantee conveys a portion of the land and receives the consideration money, the guarantor of the contract is liable for the money thus received.—Stymets v. Brooks, 10 Wend. 206.

[n] (N. Y. Sup. 1843) A general letter of credit, whereby the writer engages to guaranty the payment of such debts as the bearer may contract on the usual credit to a specified amount, sufficiently expresses its consideration.—Benedict v. Sherill, Hill & D. Supp 219.

[o] (N. Y. Sup. 1851) Where a person, by an instrument in writing, under seal, expressing a consideration of one dollar to him in hand paid, guaranties the payment of a debt owing by another, the consideration thus expressed is sufficient to satisfy the requirements of the statute of frauds, and to support an action upon the guaranty, notwithstanding the defendants prove on the trial that the one dollar was not in fact paid.—Childs v. Barnum, 11 Barb. 14, affirming Barnum v. Childs (Super. 1847) 3 N. Y. Super. Ct. 58.

[p] (N. Y. Sup. 1877) Since the passage of Laws 1863, c. 464, a promise to

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pay the debt of another need not expressly state a consideration. It is enough if the consideration appears by necessary implication, in construing the memorandum.—Castle v. Beardsley, 10 Hun, 343.

[q, r] (N. Y. Sup. 1894) A guaranty of the payment of an overdue bond "within one year from the date of this instrument" shows that the guaranty was in consideration of extending the time of payment of the bond for one year, and sufficiently states the consideration, within the requirements of the statute of frauds.—Smith v. Northrup, 80 Hun, 65, 29 N. Y. Supp. 851, affirmed (App. 1895) 145 N. Y. 627, 40 N. E. 165.

[s] (N. Y. Super. 1850) A letter written to G., stating that, if the owner of a specified house would let it to G. at a rent named, the writer would become security for G., and directing G. to state the same and to send the papers to the writer for execution, expresses on its face a sufficient consideration to sustain the promise, within the statute of frauds.—Waterbury v. Graham, 6 N. Y. Super. Ct. 215.

[t] (Vt. Sup. 1863) A letter to an attorney in which defendant assures the attorney that his (defendant's) brother is "perfectly good," and binds himself to be accountable that plaintiff shall be paid for services rendered and to be rendered in a certain suit, sufficiently expresses a consideration.—Roberts v. Griswold, 35 Vt. 496, 84 Am. Dec. 641.

[u] (Wis. Sup. 1857) A letter of guaranty informing the persons to whom it is addressed that "Mr. C. [the bearer of the letter] will purchase a small stock of clothing of you, which I hope you will sell him cheap," sufficiently expresses the consideration.—Eastman v. Bennett, 6 Wis. 232.

[v] (Wis. Sup. 1863) If an undertaking on appeal could be held to be an agreement to answer for the debt of another, the recital of the rendition of judgment that the party against whom it is rendered feels aggrieved thereby, and intends to appeal therefrom, and wishes to stay the execution of the same, expresses a sufficient consideration, under the statute of frauds.—Johnson v. Noonan, 16 Wis. 687.

[w] (Wis. Sup. 1865) A memorandum in the following form: "I will be responsible for the purchase of goods from W. S. & Co., for H. C. D., or by his order, until I give them notice to the contrary,"—dated and signed by defendant, expresses a consideration, and is a valid agreement within the statute of frauds.—Williams v. Ketchum, 19 Wis. 231.

[x] (Wis. Sup. 1897) A written warranty of an "account" of a certain person, where the word "account" refers to an indebtedness about to be incurred, sufficiently expresses the consideration to satisfy the statute of frauds.—Waldheim v. Miller, 72 N. W. 869, 95 Wis. 300.

5. —— Past Consideration.

[a] (N. Y. Sup. 1862) A dispatch: "I will be responsible for P.'s bill of goods ordered yesterday. R.,"—aided by proof that P. had ordered goods, and that the seller had written to R. declining to deliver them on P.'s order, sufficiently expresses on its face a present consideration.—Dunning v. Roberts, 35 Barb. 463.

[b] (N. Y. Super. 1850) Upon a purchase of goods of the plaintiffs by A. & Co., the defendant guarantied the payment of the price by an instrument in these words: "Bill, October 2d, 1844, $1,306.29. I hereby agree to guaranty the payment of A. & Co.'s note for the above amount, in favor of Messrs. Weed, Masters & Weed, payable nine months after date thereof, viz. from 2d October, 1844." *Held*, that the guaranty by its terms plainly expressed a past consideration, and therefore, for want of a valid consideration, would not support an action, within the statute of frauds.—Weed v. Clarke, 6 N. Y. Super. Ct. 31.

[c] (N. Y. Com. Pl. 1892) A recital in an alleged contract of guaranty, as a consideration therefor, that the guarantor had entered into various contracts with a certain other person, shows a past consideration, and is insufficient to support the guaranty.—Marston v. French, 17 N. Y. Supp. 509.

6. —— Indorsement of Notes.

[a] (Ala. Sup. 1893) A blank indorsement of a note by one not a party thereto is, so long as the note remains in the hands of the payee, void under

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the statute of frauds, as an undertaking to answer for the debt, default, or miscarriage of another, for which no consideration was expressed.—Hood v. Robbins, 98 Ala. 484, 13 South. 574.

[b] (Md. App. 1879) A. wrote her name across the back of a single bill nine months after its delivery. The payee sued A. as upon a guaranty, and at the trial wrote over her signature matter purporting to be a contract of guaranty, and offered testimony tending to show the contract between himself and the maker of the bill to have been incomplete before the indorsement, and that until then the bill had been delivered provisionally only, and that he parted with his money in consideration of the above. *Held*, that the statute of frauds was a bar to the suit, since the mere blank indorsement is not a sufficient writing, not showing the consideration, and the subsequent writing was not signed by the defendant.—Culbertson v. Smith, 52 Md. 628, 36 Am. Rep. 384.

[c] (Minn. Sup. 1869) A mere signature on the back of a note is not sufficient to evidence a contract of guaranty. There must, under the statute of frauds, be a memorandum expressing a consideration.—Moor v. Folsom, 14 Minn. 340 (Gil. 260), 100 Am. Dec. 227.

7. *Reference to Original Contract.*

[a] (Cal. Sup. 1859) The order for an injunction is to be taken in connection with the injunction bond, and, when so taken, sufficiently expresses the consideration, within our statute of frauds.—Prader v. Purkett, 13 Cal. 588.

[b] (Cal. Sup. 1864) By indorsement of a contract at the time at which it is made, the indorsee makes the language of the contract his own, and it is not necessary that the consideration should be expressed in any set phrase.—Otis v. Haseltine, 27 Cal. 80.

[c] (N. Y. App. 1850) Where A. by a general letter of credit undertook to accept and pay drafts to be drawn by B. to a given amount, and C., at the foot of the letter, at the same time wrote and signed these words: "I hereby agree to guaranty the due acceptance and payment of any draft or drafts issued in virtue of the above credit,"—the letter and guaranty should be read together; and hence the consideration of the guaranty was sufficiently expressed to satisfy the statute of frauds.—Bank v. Coster, 3 N. Y. 203, 53 Am. Dec. 280, affirming (Super. 1848) 3 N. Y. Super. Ct. 563.

[d] (N. Y. App. 1860) A. and B. contracted in writing for the sale of goods. C. indorsed on the writing, at the time of the agreement, "I will be responsible for all such goods as B. shall buy of A. and shall not pay for according to the within agreement." *Held*, that the undertaking sufficiently expressed the consideration thereof to be the delivery of goods at the guarantor's request, without any reference to the writing it was indorsed upon.—Church v. Brown, 21 N. Y. 315, reversing judgment (Sup. 1859) 29 Barb. 486.

[e] (N. Y. Sup. 1814) Plaintiffs having issued a fi. fa. against their debtor, he executed an agreement to deliver them at a future date goods at specified prices to pay the same, in consideration that plaintiffs would, the costs being paid, return the execution unsatisfied. Defendant signed a guaranty at the bottom thereof. *Held*, that this was an original, and not a collateral, undertaking on defendant's part, in which no consideration need be expressed; but, if necessary, the consideration was sufficiently expressed by reference to the debtor's undertaking.—Bailey v. Freeman, 11 Johns. 221, 6 Am. Dec. 371.

[f] (N. Y. Sup. 1833) A factor, being sued for a breach of warranty as to the quality of goods sold, refused to pay over to his principals a balance of the proceeds of the sale until he was indemnified against the suit, in which issue had been joined. His principals thereupon addressed a note to third persons, stating the existence of the suit, that the sale was on their account, and that they wished to indemnify the factor, and requested them to pay to their factor, as he might require, all such sums as he might be required to pay by way of damages and costs, and to charge them to the principals. The persons to whom the note was addressed indorsed and signed an engagement thereon as follows: "We will promptly comply with the request of Messrs. L. M. & Sons, as contained in the within order." Upon the receipt of such engagement, the factor paid over to his principals the balance. *Held*,

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that the instrument showed on its face a sufficient consideration for the promise by such third persons.—Rogers v. Kneeland, 10 Wend. 218, affirmed (1834) 13 Wend. 114.

[g] (N. Y. Sup. 1870) A bond given to secure the payment of money subscribed for the erection of county buildings was indorsed on the day of its date, and before delivery, "I guaranty payment of the within bond." *Held*, that the consideration of the guaranty was sufficiently expressed.—Marsh v. Chamberlain, 2 Lans. 287.

[h] (N. Y. Super. 1859) An instrument under seal, written beneath a lease to A., whereby, "in consideration of the demise of the premises above mentioned," the signers covenant for the payment of the rent reserved in the lease, is a valid agreement under the statute of frauds, and sufficiently expresses the consideration.—McKenzie v. Farrell, 17 N. Y. Super. Ct. 192.

[i] (N. Y. Super. 1863) Where persons holding a contract for the supply of certain merchandise to the government, which was to be subject to inspection, delivered a part of the goods, and pledged the government receipts therefor to the plaintiff as security for a debt due to him, and subsequently assigned the contract to the defendant, in consideration, among other things, of his assuming to pay all their debts, and the defendant, in order to obtain the receipts pledged, so that he might effect a settlement with the government, gave to the plaintiff a written promise that he would pay the amount of the debt whenever he received certificates from the government for the payment of so much upon the contract, in consideration that the plaintiff should aid in procuring the inspection and acceptance of the goods without charge, and the plaintiff at the same time gave to the defendant a written promise to assist him accordingly without charge. it was *held* that the promise to pay the plaintiff was not void, under the statute of frauds, as, taken together, these two instruments expressed a consideration.—Winfield v. Potter, 23 N. Y. Super. Ct. 226.

[j] (Wis. Sup. 1857) A guaranty of the rent, attached to the lease, is within the statute, and the consideration must be expressed in writing; and the fact that the agreement to hire and to guaranty are parts of the same instrument does not show consideration.—Hutson v. Field, 6 Wis. 407.

8. Agreement Not to be Performed within One Year.

[a] (Ala. Sup. 1882) Under the statute of frauds, providing that any agreement not to be performed within a year shall be void unless the agreement or some memorandum thereof expressing the consideration is in writing, a contract for personal services for one year to commence in futuro, on the expiration of a similar contract, merely stating that the amount of salary shall be the same as the prior year, without naming it, is void.—Horton v. Wollner, 71 Ala. 452.

9. Sale of Goods.

[a] (Or. Sup. 1877) A memorandum in form, "S. will purchase from C. 150 tons of coal at $14 per ton," signed by S., containing no agreement by C. to sell, is unilateral, and therefore does not sufficiently express the consideration to comply with the statute of frauds (Civ. Code, p. 264, § 775), which requires that the consideration be expressed.—Corbitt v. Gas-Light Co., 6 Or. 405, 25 Am. Rep. 541.

10. Agreements Relating to Land.

[a] (N. H. Sup. 1894) Where a purchaser paid down part of the price for land, was to pay more on delivery of the deed, and the balance by assuming a mortgage, a memorandum which stated the price to be a lump sum did not identify the price, as required by the statute of frauds.—Stockwell v. Williams, 41 Atl. 973.

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(107 Fed. 114.)

LACKEY v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. February 12, 1901.)

No. 840.

ELECTIONS—OFFENSES AGAINST RIGHT OF SUFFRAGE—CONSTITUTIONALITY OF FEDERAL LEGISLATION.

Rev. St. § 5507, providing that "every person who prevents, hinders, controls, or intimidates another from exercising or in exercising the right of suffrage, to whom that right is guaranteed by the fifteenth amendment to the constitution of the United States, by means of bribery or threats," etc., shall be punished, is void, as beyond the constitutional power of congress. The only power possessed by congress to legislate with reference to elections held solely for state or municipal purposes is derived from the fifteenth constitutional amendment, providing that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude," and that "the congress shall have power to enforce this article by appropriate legislation"; but the right conferred by such article, and which congress may enforce by legislation, is not the right of suffrage, but the right of the citizen to exemption from being discriminated against in the exercise of the elective franchise by the United States or a state on account of race, color, or previous condition of servitude, while the statute is not limited to the enforcement of such right, and in fact has no relation to it, but is so broad in its terms as to make punishable as a criminal offense an act of a private person committed at a state election, if committed against a voter of African descent, although it has no relation to the race, color, or previous condition of such voter.

In Error to the District Court of the United States for the District of Kentucky.

The plaintiff in error has been convicted under an indictment based upon section 5507 of the Revised Statutes of the United States. The indictment contained two counts, the first of which charged, in substance, that certain "negroes, colored men, men of African descent, and not white men," being citizens of Kentucky and of the United States, and qualified voters under the laws of Kentucky and of the United States, were unlawfully and feloniously "and on account of their race, color, and previous condition of servitude," intimidated and prevented from exercising their lawful right of suffrage at a certain state election held in the state of Kentucky on November 7, 1899, for the election of state, county, and municipal officers, "by means of bribery, and by bribing them," the said citizens and voters of African descent. The second count is identical with the first, save that it omits the averments that the intimidation and bribery were "on account of race, color, or previous condition of servitude." The district attorney dismissed the first count, and went to trial upon the second count, and secured a conviction thereunder. See 99 Fed. 952.

Isaac T. Woodson, for plaintiff in error.

R. D. Hill and W. C. P. Breckenridge, for the United States.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

LURTON, Circuit Judge, having made the foregoing statement of the case, delivered the opinion of the court.

There was evidence tending to show that the plaintiff in error "prevented" a number of voters "of African descent" from voting at a purely state election, at which they were qualified to vote under the law of Kentucky, by promising them that if they would go away

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from the polls without voting, and stay away until after the polls had been closed, he would pay each of them the sum of five dollars. The only count upon which the plaintiff in error was tried contained no averment that these colored voters were "prevented" from exercising the right of suffrage "on account of race, color, or previous condition of servitude," nor was any such discrimination made an element of the offense by any ruling or charge of the court below. Neither was it averred in the indictment, nor shown in the proof, that these colored citizens and voters were prevented, hindered, or controlled in the exercise of their right of suffrage at any election at which either presidential electors or congressmen were to be voted for. Nor was it averred or pretended that there was any law of the state of Kentucky which either denied or abridged the right of suffrage on "account of race, color, or previous condition of servitude," or that the plaintiff in error, in preventing these colored voters from exercising the right of suffrage, was acting in any official character whatever. Is it, then, an offense against the United States, if a private citizen prevents a colored citizen and qualified voter from voting at a purely state election, where his conduct is not grounded upon "race, color, or previous condition of servitude"? The indictment is based upon section 5507 of the Revised Statutes of the United States, which reads as follows:

"Every person who prevents, hinders, controls, or intimidates another from exercising, or in exercising, the right of suffrage, to whom that right is guaranteed by the fifteenth amendment to the constitution of the United States, by means of bribery or threats of depriving such person of employment or occupation, or of ejecting such person from a rented house, lands, or other property, by threats of refusing to renew leases or contracts for labor, or by threats of violence to himself or family, shall be punished as provided in the preceding section."

This section comes from the enforcement act of May 31, 1870 (16 Stat. 141), and is the fifth section of that act, carried into the revision without alteration. This section provides for the punishment of those who obstruct the free exercise of the elective franchise, without distinction between elections where presidential electors or members of congress are to be chosen and those which are only for the election of state or municipal officers. It is also very clear that it is not limited to offenses grounded upon race, color, or previous condition of servitude. The only limitation of the provision is that the offenses shall be in respect of the exercise of the right of suffrage by a class of voters described as those "to whom that right is guaranteed by the fifteenth amendment to the constitution of the United States." It is a well-settled rule of constitutional construction that the congress has power to protect the exercise of every right created by, arising under, or dependent upon the constitution of the United States, and may provide for the enforcement of every such right, privilege, or immunity by such legislation as may be reasonably adapted to that end. Ex parte Yarbrough, 110 U. S. 651, 4 Sup. Ct. 152, 28 L. Ed. 274; In re Neagle, 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55; Logan v. U. S., 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429; In re Quarles, 158 U. S. 532, 15 Sup. Ct. 959, 39 L. Ed. 1080. Examples of rights arising

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under or dependent upon the constitution and laws of the United States are found in the cases cited above. Thus, the right to vote for a member of congress was, in Ex parte Yarbrough, held to be a right arising under the constitution of the United States. In U. S. v. Cruikshank, 92 U. S. 542, 553, 23 L. Ed. 588, it was said that the right to petition congress for a redress of grievances is a right secured to citizens of the United States by the constitution. In Logan v. U. S., cited above, it was held that the right of a prisoner in the lawful custody of an officer of the United States to be protected against assault and murder is a right arising under and dependent upon the constitution. In Re Quarles, cited above, it was held that it is the right of every private citizen to inform a marshal of the United States of a violation of the revenue laws of the United States, and a right secured by the constitution, and that a conspiracy to injure, oppress, threaten, or intimidate in the free exercise of this right, or because of having exercised it, is punishable under section 5508 of the Revised Statutes. So, in the Case of Neagle, 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55, it was held that the right of every judicial or executive officer of the United States to be protected from lawless violence while in the exercise of the duties and functions of his office is a right arising under the constitution, and that it is the duty of the United States to afford such protection. In Ex parte Yarbrough the conviction was upon an indictment based upon section 5508, Rev. St., which provides for the punishment of those who conspire "to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the constitution or laws of the United States." The conspiracy charged was that the defendants conspired to intimidate a citizen of African descent in the exercise of his right to vote for a member of congress, and that they did this on account of his race, color, or previous condition of servitude. The conviction was sustained upon the ground that the right to vote for a member of congress depended upon the constitution of the United States, and was, therefore, a right secured thereby, which it was the duty of congress to protect. Upon this subject, the court, speaking by Justice Miller, said:

"But it is not correct to say that the right to vote for a member of congress does not depend on the constitution of the United States. The office, if it be properly called an office, is created by that constitution, and by that alone. It also declares how it shall be filled by election. Its language is: 'The house of representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.' Article 1, § 2. The states, in prescribing the qualifications of voters for the most numerous branch of their own legislatures, do not do this with reference to the election for members of congress. Nor can they prescribe the qualification for voters for those eo nomine. They define who are to vote for the popular branch of their own legislature, and the constitution of the United States says the same persons shall vote for members of congress in that state. It adopts the qualification thus furnished as the qualification of its own electors for members of congress. It is not true, therefore, that electors for members of congress owe their right to vote to the state law in any sense which makes the exercise of the right to depend exclusively on the law of the state."

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The judgment of the court was also rested, in part, upon the broader ground that the congress had the general implied "power to protect the elections on which its existence depends from violence and corruption." But all that is said in that case upon this aspect of the question was said of elections at which electors or congressmen are to be chosen, and of the direct interest of the United States in securing such elections from violence, corruption, and fraud. But whether the power of congress to legislate in respect to congressional elections depends upon the effect of the second and fourth sections of article 1 of the constitution, or arises out of the implied power to protect such elections against violence and fraud because they are federal elections so far as federal officials are thereby directly chosen, it is very obvious that, whether such power be attributed to either the one or the other source, it furnishes no reason for any interference at a purely state election. This we do not understand to be controverted by the able counsel who have argued this case. But, whether conceded or not, it remains as true now as it was when the supreme court, in U. S. v. Reese, 92 U. S. 214, 218, 23 L. Ed. 563, said that the power of congress to legislate at all upon the subject of state elections depends upon the fifteenth amendment to the constitution. If, therefore, section 5507 of the Revised Statutes is not legislation authorized by that amendment, it must fall. That amendment is in these words:

"Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of race, color or previous condition of servitude.

"Sec. 2. The congress shall have power to enforce this article by appropriate legislation."

That amendment does not confer a right of suffrage upon any one, nor does it secure or guaranty any right of suffrage to any class of citizens. It has no other force or effect than to forbid discrimination by the United States and by the states "on account of race, color, or previous condition of servitude." This precise question arose in U. S. v. Reese, 92 U. S. 215, 23 L. Ed. 563, where the constitutionality of the third and fourth sections of the act of May 31, 1870, was involved. Those sections were parts of the original enforcement act, from which section 5507 of the Revised Statutes comes; it having been the fifth section of that act. Those sections, like the fifth section, were broad enough to cover unlawful obstructions to the exercise of the elective franchise, whether committed at state elections or elections where electors or members of congress were to be chosen; and, like the fifth section, were not limited to discriminations "on account of race, color, or previous condition of servitude." The third section of the act there involved provided that an offer to perform any act made by law a prerequisite to voting was equivalent to performance, where performance was wrongfully denied by the officer executing the law; and the fourth section prescribed penalties for unlawfully hindering, obstructing, or preventing any citizen from doing any act required to be done to qualify him to vote. The fifth section continues the protection extended to voters by providing for the punishment of those who should

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by intimidation or bribery prevent any person from exercising the elective franchise "to whom the right of suffrage is secured or guaranteed by the fifteenth amendment of the constitution of the United States." Certain inspectors of a municipal election in the state of Kentucky were indicted for refusing to receive and count at said election the vote of one Garner, a citizen of the United States of African descent. The indictment was based upon the third and fourth sections. The contention there, as here, was that the fifteenth amendment had created a class of voters which it was the duty of congress to protect in the exercise of the elective franchise, and that it was competent for congress to provide for the punishment of every obstruction to the exercise of that right as a right arising under or dependent upon the constitution of the United States. To this contention the court said:

"Rights and immunities created by or dependent upon the constitution of the United States can be protected by congress. The form and the manner of the protection may be such as congress, in the legitimate exercise of its legislative discretion, shall provide. These may be varied to meet the necessities of the particular right to be protected. The fifteenth amendment does not confer the right of suffrage upon any one. It prevents the states, or the United States, however, from giving preference, in this particular, to one citizen of the United States over another on account of race, color, or previous condition of servitude. Before its adoption, this could be done. It was as much within the power of a state to exclude citizens of the United States from voting on account of race, etc., as it was on account of age, property, or education. Now it is not. If citizens of one race, having certain qualifications, are permitted by law to vote, those of another having the same qualifications must be. Previous to this amendment, there was no constitutional guaranty against this discrimination; now there is. It follows that the amendment has invested the citizens of the United States with a new constitutional right, which is within the protecting power of congress. That right is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. This, under the express provisions of the second section of the amendment, congress may enforce by 'appropriate legislation.' This leads us to inquire whether the act now under consideration is 'appropriate legislation' for that purpose. The power of congress to legislate at all upon the subject of voting at state elections rests upon this amendment. The effect of article 1 § 4, of the constitution, in respect to elections for senators and representatives, is not now under consideration. It has not been contended, nor can it be, that the amendment confers authority to impose penalties for every wrongful refusal to receive the vote of a qualified elector at state elections. It is only when the wrongful refusal at such an election is because of race, color, or previous condition of servitude that congress can interfere, and provide for its punishment. If, therefore, the third and fourth sections of the act are beyond that limit, they are unauthorized."

Examining the sections there involved, the court held that neither section was confined in its operation to unlawful discriminations on account of race, color, or previous condition of servitude. "If congress had the power," said the court, "to provide generally for the punishment of those who unlawfully interfere to prevent the exercise of the elective franchise without regard to such discrimination, the language of these sections would be broad enough for that purpose." Having held that congress was only authorized to interfere with the voting at a state election when the wrongful refusal to receive and count a vote is because of race, color, or previous con-

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dition of servitude, the court held that the two sections there involved were beyond the limit authorized by the fifteenth amendment.

In U. S. v. Cruikshank, 92 U. S. 542, 555, 556, 23 L. Ed. 588, two of the counts of the indictment were for hindering and preventing the citizens named, who were described as being of African descent, "in the free exercise and enjoyment of their several and respective right and privilege to vote at any election to be thereafter by law had and held by the people in and of the state of Louisiana, or by the people of and in the parish of Grant aforesaid." These counts, as well as all the other counts of the indictment, were based upon the sixth section of the act of May 31, 1870, now section 5508 of the Revised Statutes. Concerning these particular counts, the court said:

"In Minor v. Happersett, 21 Wall. 178, 22 L. Ed. 627, we decided that the constitution of the United States has not conferred the right of suffrage upon any one, and that the United States have no voters of their own creation in the states. In U. S. v. Reese, 92 U. S. 214, 23 L. Ed. 563, we hold that the fifteenth amendment has invested the citizens of the United States with a new constitutional right, which is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. From this it appears that the right of suffrage is not a necessary attribute of national citizenship, but that exemption from discrimination in the exercise of that right on account of race, etc., is. The right to vote in the states comes from the states, but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the constitution of the United States, but the last has been. Inasmuch, therefore, as it does not appear in these counts that the intent of the defendants was to prevent these parties from exercising their right to vote on account of their race, etc., it does not appear that it was their intent to interfere with any right granted or secured by the constitution or laws of the United States. We may suspect that race was the cause of the hostility, but it was not so averred. This is material to a description of the substance of the offense, and cannot be supplied by implication. Everything essential must be charged positively, and not inferentially. The defect here is not in form, but in substance."

Similar views as to the limitation upon the powers of congress in respect of the legislation authorized by the fifteenth amendment are expressed in U. S. v. Harris, 106 U. S. 629, 637, 1 Sup. Ct. 601, 27 L. Ed. 290.

But it is said that the law upon which the indictment at bar is based escapes the vice of the law condemned in U. S. v. Reese, supra, by the fact that its operation is confined to offenses obstructive to the exercise of the elective franchise by a class of voters described in the law as "those to whom the right of suffrage is secured and guarantied by the fifteenth amendment." "This class," counsel say, "is constituted solely of citizens of African descent, and the operation of the law limited to offenses denying or abridging this right of suffrage." But this argument is based upon a misapprehension of the vice in those portions of the enforcement act commented upon in U. S. v. Reese. If the right conferred, secured, or guarantied by the fifteenth amendment is not the right of suffrage, but the right of exemption from discrimination in the exercise of the elective franchise on account of race, color, etc., then the legislation which congress is authorized to enact in respect of

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voting at state elections by that amendment must be limited to acts which prevent or punish the discrimination therein forbidden. Every wrongful obstruction of the suffrage of the black man at a state election is not on account of race, color, etc. Unless he is hindered or prevented from the free exercise of the elective franchise on account of his race, color, etc., there has not been a denial or abridgment of the right of suffrage within the prohibitions of the amendment. Both U. S. v. Reese and U. S. v. Cruikshank were decided upon the ground that discrimination on account of color, race, etc., is essential to the commission of any offense against the United States at a state election. In Ex parte Yarbrough, cited above, this limitation was held not to apply at elections where congressmen were to be chosen, because the right to vote for congressmen is a right secured by and dependent upon the constitution of the United States, the office being created and the qualification of voters being determined by that instrument.

The vice of the fifth section, now section 5507 of the Revised Statutes, is precisely the vice of the third and fourth sections of the same act. It is not limited in its operation to congressional or presidential elections, nor to offenses grounded upon race, color, or previous condition of servitude. Reading the section in connection with the other parts of the act from which it was taken, it is too obvious for discussion that congress intended that it should have operation in all elections, and should not be limited to obstructions to the free exercise of the elective franchise based upon race, etc. Indeed, this is the very meaning attached to the act by the court below. The indictment in the case at bar did not aver the bribery to have been because of color, etc., and, if it had, it would have added an element not named in the statute. The same conclusion, in respect to the invalidity of this section, was reached by Judge Gresham, in U. S. v. Amsden (D. C.) 6 Fed. 319. Without considering the further question as to whether the power of congress to legislate in respect to purely state elections is not also limited to prohibitions of discrimination by the United States, and by the states and their officers or others, claiming to act under color of laws within the prohibition of the amendment, we are content to hold that section 5507 is void, as including within its operation offenses not grounded upon race, color, or previous condition of servitude, and therefore in excess of the power of congress in respect of state elections; its powers in respect to such elections being dependent upon the fifteenth amendment alone.

A number of errors in respect to the charge delivered and to charges refused have been assigned. Inasmuch as we have unanimously reached the conclusion that the law under which the indictment was found is repugnant to the constitution, it becomes unnecessary to consider the mere details of the trial. Judgment reversed, with directions to sustain the demurrer to the indictment, and discharge the plaintiff in error without day.

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(107 Fed. 121.)

DE LEMOS v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. February 19, 1901.)

No. 938.

CRIMINAL LAW—PROCEDURE FOR REVIEW—APPEAL.

The fundamental distinction existing at common law between appeals and writs of error has always been recognized and maintained in the appellate procedure of the courts of the United States, and a judgment in an action at law or in a criminal case has never been reviewable except by writ of error; nor was it the purpose of congress to change such rule by Act Jan. 20, 1897 (29 Stat. 492), amending section 5 of the act creating the circuit courts of appeals by transferring from the supreme court to such courts appellate jurisdiction in a certain class of criminal cases, and which provides that "appeals or writs of error may be taken from the district courts or circuit courts to the proper circuit court of appeals in cases of conviction of an infamous crime not capital." The words "appeal or writ of error" are used in several places in the original act, not as permitting the use of the remedies interchangeably, but the use of either as should be appropriate to the case; and, construing the amendment in connection with the other provisions of the act, it cannot be held to confer jurisdiction upon a circuit court of appeals to review a criminal case by appeal.

Appeal from the Circuit Court of the United States for the Middle District of Alabama.

John G. Winter and Francis G. Caffey, for appellant.

W. S. Reese, Jr., U. S. Atty. (J. Sternfeld, Asst. U. S. Atty., on the brief).

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. This case is submitted on a motion to dismiss the appeal. Ben de Lemos was indicted and convicted in the court below for violation of the pension laws of the United States, and he was sentenced to imprisonment in the Ohio penitentiary for five years. On the day he was convicted the circuit court made an order suspending execution of the sentence pending the appeal The order provided for the suspension of the sentence "pending appeal on writ of error to the circuit court of appeals, on defendant's executing a bond in the sum of $1,500, as required by law and the rules of the court." On the same day a bond was given, and approved by the judge presiding in the circuit court, which recited that "Ben de Lemos has prayed for and taken an appeal to the United States circuit court of appeals of the Fifth circuit to reverse the judgment and sentence in the aforesaid suit." There was no formal petition for, nor order allowing, an appeal, but it is claimed by the appellant that the approval of the appeal bond is sufficient to perfect the appeal. Brandies v. Cochrane, 105 U. S. 262, 26 L. Ed. 989. Whether the bond given was sufficient to bring the case within this rule is immaterial, and will not be considered. The issuance and service of citation of appeal were waived by the United States. The defendant was allowed 90 days in which to file a bill of exceptions, and it was duly filed. The record, duly certified by the clerk, was filed in this court

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on May 12, 1900. No writ of error appears in the record. None was ever issued or prayed for in the case. The appellant claims that this court has jurisdiction of the case by appeal. The United States moves to dismiss the case because it could only be brought to this court by writ of error.

The writ of error and the appeal are the two principal methods known to English jurisprudence and to the jurisprudence of the federal courts by which cases may be removed from an inferior to an appellate court for review. There are other exceptional modes of review, not material to this case. The appeal is the only method by which a decree in chancery or in admiralty can be brought from a district court or circuit court to the supreme court or to this court for review. The appeal brings up the whole case for re-examination on the merits as to both law and facts, and for decision as though no decree had ever been rendered. A writ of error was the appropriate remedy at common law, by which a party aggrieved by the judgment of an inferior court could remove the judgment for examination into a superior tribunal having jurisdiction to revise it. The writ was defined in Cohens v. Virginia, 6 Wheat. 409, 5 L. Ed. 292, as "a commission by which the judges of one court are authorized to examine a record upon which a judgment was given in another court, and on such examination to affirm or reverse the same according to law." Cases brought up for review on writ of error, unlike cases brought up by appeal, are not open for re-examination on their whole merits, but every controverted question of fact is excluded from consideration, and the appellate court is confined to reviewing rulings of the inferior court on questions of law. This distinction in federal appellate procedure is fundamental, and has existed for more than a century. The distinction in the two modes of review is preserved, not in name, but in principle, by the constitution, for the seventh amendment provides that "no fact tried by a jury shall be otherwise examined in any court of the United States than according to the rules of the common law." This distinction between the uses of the writ of error and the appeal is settled by a long line of decisions of the supreme court and of the several United States courts of appeals. A few of them may be cited: Sarchet v. U. S., 12 Pet. 143, 9 L. Ed. 1033; Bondurant v. Watson, 103 U. S. 278, 26 L. Ed. 447; Nelson v. Huidekoper, 66 Fed. 616, 13 C. C. A. 658; Nelson v. Lowndes County, 93 Fed. 538, 35 C. C. A. 419; Stevens v. Clark, 62 Fed. 321, 10 C. C. A. 379. The learned counsel for the appellant do not controvert this distinction as applicable usually in appellate federal procedure. Their contention is that an appeal is allowed in the case at bar by a proper construction of the statute of January 20, 1897 (29 Stat. 492), which is as follows:

"An act to withdraw from the supreme court jurisdiction of criminal cases not capital, and confer the same on the circuit courts of appeals.

"Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that so much of section five of the act entitled 'An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes,' approved March third, eighteen hundred and ninety-one, as reads 'in cases of conviction of a capital or otherwise infamous

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crime,' be amended by striking out the words 'or otherwise infamous,' so that the same will read 'in cases of conviction of a capital crime'; and that appeals or writs of error may be taken from the district courts or circuit courts to the proper circuit court of appeals in cases of conviction of an infamous crime not capital: provided, that no case now pending in the supreme court or in which an appeal or writ of error shall have been taken or sued out before the passage of this act shall be hereby affected, but in all such cases the jurisdiction of the supreme court shall remain, and said supreme court shall proceed therein as if this act had not been passed."

The learned counsel for the appellant rely on the letter of the statute,—that "appeals or writs of error may be taken." It is urged that there is no room for construction, and Coke is quoted, that it is a case "where the words are plain, without scruple, and absolute, without any saving." The contention is that the amendment confers on a defendant convicted of an infamous crime the right to review the judgment of the circuit court, at his option, either by appeal or writ of error. The use of the word "or," counsel contend, makes it clear that congress intended that the appellate jurisdiction might be invoked by either appeal or writ of error at the option of the defendant. If such was the intention of congress, it would be the duty of the courts, so far as they could, to give effect to such intention; but we should not conclude hastily that the congress intended to abolish a distinction in federal procedure that has been so carefully and so long preserved in previous legislation and in the adjudications of the federal courts. The act in question is one of several acts conferring appellate jurisdiction on the circuit court of appeals, and it must be construed in connection with the others. The act of March 3, 1891, which established the circuit court of appeals, made a division of appellate jurisdiction between those courts and the supreme court. Section 5 designated several classes of cases in which "appeals or writs of error" may be taken from the district or circuit courts direct to the supreme court. The third class named was, "In cases of the conviction of a capital or otherwise infamous crime." Section 6 confers on the circuit court of appeals jurisdiction to review by "appeal or writ of error" the final decisions of the district or circuit courts in all cases other than those provided for in section 5. The act vested in the supreme court appellate jurisdiction of capital and otherwise infamous crimes, and in the circuit court of appeals appellate jurisdiction of the lesser criminal cases,—those not capital or otherwise infamous. Under the federal law a very large number of crimes are infamous, and as the act stood it would have added largely to the number of cases to be decided by the supreme court, many of them not before reviewable in any court, and to some extent it would have defeated the purpose of the act, which was to relieve the supreme court. That was the condition when the act of January 20, 1897, was passed. Its leading purpose was to relieve the supreme court from the burden of deciding criminal cases not capital. The title of the act shows this. It is, "An act to withdraw from the supreme court jurisdiction of criminal cases not capital and confer the same on the circuit courts of appeals." The result was accomplished by striking out of section 5 the words "or otherwise infamous." Before further considering the amendment, we should see how the original act was construed.

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It will be remembered that section 5, conferring appellate jurisdiction on the supreme court, provided that such jurisdiction should be exercised on "appeals or writs of error." Before the amendment of the act, and while the supreme court had jurisdiction of cases of "infamous crimes," one Bucklin, who had been convicted of perjury, and sentenced to imprisonment at hard labor in the penitentiary, took an appeal from the district court of the United States for the district of Kansas to the supreme court. Mr. Justice Harlan, delivering the opinion of the court, said:

"The appeal must be dismissed. By section 5 of the act of March 3, 1891, c. 517 (26 Stat. 826), 'appeals or writs of error may be taken from the district courts or from the existing circuit courts' of the United States directly to this court in certain enumerated cases, civil and criminal,—among others, 'in cases of conviction of a capital or otherwise infamous crime.' There was no purpose by that act to abolish the general distinction at common law between an appeal and a writ of error. The final judgment of a court of the United States of the conviction of a capital or otherwise infamous crime is not reviewable here except upon writ of error. Our review of the judgment, when brought here in that form, is confined to questions of law properly presented by a bill of exceptions or arising upon the record." Bucklin v. U. S., 159 U. S. 680, 16 Sup. Ct. 182, 40 L. Ed. 304.

The amendatory act of January 20, 1897, must be construed in connection with the original act of March 3, 1891. We find in several places in the original act the words "appeal or writ of error." They are used, for example, in section 6, in conferring on the supreme court the right to review in certain cases the judgment of the circuit courts of appeals. Although the words "appeal or writ of error" are used disjunctively, the remedies could not be used interchangeably, but the remedy appropriate to the case must be chosen. Section 11 of the act shows the intention of congress to preserve the methods in use:

"And all provisions of law now in force regulating the methods and system of review, through appeals or writs of error, shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the circuit courts of appeals; including all provisions for bonds or other securities to be required and taken on such appeals and writs of error; and any judge of the circuit court of appeals, in respect of cases brought or to be brought to that court, shall have the same powers and duties as to the allowance of appeals or writs of error, and the conditions of such allowance, as now by law belong to the justices or judges in respect of the existing courts of the United States, respectively."

In Chase v. U. S., 155 U. S. 489, 495, 15 Sup. Ct. 174, 39 L. Ed. 284, the court construed an act to provide for the bringing of suits against the government of the United States. 24 Stat. 505. The act in several of its sections used the words "appeal or writ of error," referring to a review by the supreme court of the final decision of the court of claims. Section 9 of the act provided:

"That the plaintiff or the United States, in any suit brought under the provisions of this act, shall have the same rights of appeal or writ of error as are now reserved in the statutes of the United States in that behalf made, and upon the conditions and limitations therein contained. The modes of procedure in claiming and perfecting an appeal or writ of error shall conform in all respects and as near as may be, to the statutes and rules of court governing appeals and writs of error in like causes."

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The court said:

"These phrases, clauses, and provisions make it, we think, reasonably clear that congress intended that the final determination of suits brought under this act in a district or circuit court of the United States shall be reviewed here upon writ of error if the case be one at law, and upon appeal if the case is one cognizable in equity or in admiralty under the existing statutes regulating the jurisdiction of those courts."

We are not unmindful of the fact that a literal construction of the words "appeals or writs of error," as used in the amendment of January 20, 1897, would tend to sustain the contention of the appellant. If the word "appeals" had been omitted, or if the phrase used in section 4 of the original act, "appeals by writ of error," had been adopted in the amendment, the apparent difficulty would be removed. If the amendment, however, is not isolated for construction, but is looked at as a part of the act which it amends, the difficulty, we think, disappears. Under the act as amended it is not denied that capital cases can only be reviewed by the supreme court on writ of error. It is conceded and is clear that other criminal cases, not infamous, can be reviewed only by writ of error in the circuit court of appeals. It is scarcely reasonable to suppose that it was the intention of congress to select a certain class of criminal cases, not the gravest nor the slightest, but a middle class, and allow them to be reviewed, at the defendant's option, either by appeal or writ of error, while the writ was alone to be used in both capital cases and minor offenses. It was not, we think, the purpose of the amendment to change the practice as to the mode of review. The same words, "appeals or writs of error," that had been used in the original act, were repeated in the amendment. The act had already been construed as not destroying the distinction between the two methods of review. The provision in the amendment "that no case now pending in the supreme court or in which an appeal or writ of error shall have been taken or sued out before the passage of this act, shall be hereby affected," shows that the word "appeals," if it is to be applied to criminal cases, means appeals by writ of error; for the supreme court had already decided on November 18, 1895, that appeal to the supreme court under the original act would not lie in a criminal case. Bucklin v. U. S., 159 U. S. 680, 681, 16 Sup. Ct. 182, 40 L. Ed. 304.

We think that a proper construction of the act as amended does not allow an appeal to this court from a judgment of the circuit court convicting a defendant of an infamous crime. This court can only review such judgment by writ of error. It has no jurisdiction of the appeal in this case, and the motion to dismiss must be granted. Dismissed.

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(107 Fed. 126.)

FALK v. CURTIS PUB. CO.

(Circuit Court of Appeals, Third Circuit. February 20, 1901.)

No. 33.

COPYRIGHT—INFRINGEMENT OF COPYRIGHT FOR PHOTOGRAPH—SUIT TO RECOVER PENALTY.

Rev. St. § 4965, as amended by Act 1895 (2 Supp. Rev. St. p. 437), providing that any infringer of a copyrighted photograph or publication, as therein specified, "shall forfeit to the proprietor all the plates on which the same shall be copied, and every sheet thereof, either copied or printed, and shall further forfeit one dollar for every sheet of the same found in his possession, either printing, printed, copied, published, imported or exposed for sale," is penal in character, and highly punitive in effect, and must be strictly construed. The provision imposing a penalty of one dollar per sheet applies only to such sheets as have been found in the defendant's possession for the purpose of forfeiture and condemnation under the preceding clause, and until the sheets have been so found no right of action to recover such penalty accrues.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

For former reports, see 98 Fed. 989, 100 Fed. 77, and 102 Fed. 967.

Samuel M. Hyneman, for plaintiff in error.

J. Martin Rommel, for defendant in error.

Before GRAY, Circuit Judge, and BRADFORD and BUFFINGTON, District Judges.

BUFFINGTON, District Judge. In the court below, Benjamin F. Falk, the plaintiff in error, brought an action of assumpsit against the Curtis Publishing Company to recover the statutory penalty forfeited to him under the provisions of section 4965 of the Revised Statutes, as amended by the act of 1895 (2 Supp. Rev. St. p. 437), by reason of the possession of copies of a copyrighted photograph. On the trial a verdict was rendered in his favor for $3,000, subject to the following reservation of law:

"Upon the 29th day of September one copy of the October number [of the infringing magazine] was bought by the office boy of Mr. Hyneman, and at a somewhat later hour of the same day the deputy marshal went to the office of the defendant with two writs, one a writ of replevin, and the other a summons in the present case, and these two writs were served at the same time. Under the writ of replevin, a certain number of copies were found. Upon these facts, the court reserves the questions of law raised by the defendant's tenth and eleventh points, namely, whether any pecuniary penalty at all is enforceable in this action."

The points referred to are as follows:

"(10) The pecuniary penalty sued for does not attach to alleged infringing copies that may have been printed, sold, offered for sale, or at some time in possession of defendant, but solely to those infringing copies, if any, which were actually found in possession of defendant, and became the property of plaintiff by actual seizure, before suit brought.

"(11) In the statute imposing the pecuniary penalty sued for, the word 'found' means that there must be a time before the cause of action accrues at which the infringing copies are actually found in the possession of defendant for the purpose of forfeiture and seizure; in other words, the pecuniary

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penalty does not accrue, nor the cause of action arise, until such forfeiture and seizure."

The amended section provides that any person offending against its provisions "shall forfeit to the proprietor all the plates on which the same shall be copied, and every sheet thereof, either copied or printed, and shall further forfeit one dollar for every sheet of the same found in his possession, either printing, printed, copied, published, imported or exposed for sale, * * * one half thereof to the proprietor and the other half to the use of the United States." The plaintiff brought two actions simultaneously against the defendant, and process in both was served at the same time. One was replevin to seize the offending prints; the other, assumpsit to recover the statutory penalty. On the writ of replevin some 3,000 prints, then found in the defendant's possession, were seized and delivered to the plaintiff. In the action of assumpsit the court below entered judgment in favor of the defendant on the reserved question, being of opinion no right of action to recover the forfeited penalty arose until the finding of the offending prints in the defendant's possession when they were seized on the writ of replevin. Such action of the court is here alleged for error, but we fail to see wherein error exists. The forfeit for which a right of action is given is not of "one dollar for every sheet in the possession" of defendant, but of "one dollar for every sheet of the same found in his possession." This statute, penal in character and highly punitive in effect, must be strictly construed, and, where the forfeiture is an arbitrary sum on sheets "found in his possession," we must give these provisions, viz. "found" and "found in his possession," due effect. Moreover, that the forfeiture arises, not on the subsequent finding by a jury, but on an actual finding of sheets in the defendant's possession, is evidenced by the fact that the finding specified in the act refers to an act then being carried on, viz. "either printing," or to an existing condition, viz. "exposed to sale." The language is, "every sheet of the same found in his possession, either printing, printed, copied, published, imported or exposed to sale." In Bolles v. Outing Co., 175 U. S. 268, 20 Sup. Ct. 96, 44 L. Ed. 158, the supreme court expressly decided that the words "found in his possession" aptly refer to a finding for the purpose of forfeiture and condemnation, and that the remedy by forfeiture and condemnation is only appropriate where the property can be seized upon process. In the case in hand there was no seizure by condemnation, forfeiture, or otherwise before the bringing of the present suit, no prints had been found in the defendant's possession when the summons in assumpsit issued, and consequently the defendant had not then "forfeit[ed] one dollar for every sheet found in his possession." If there was no forfeit when the action began, it follows there was no existing right of action to recover the fruit of the forfeiture; for an action is the prosecution of an existing right. There must be finding before there is forfeiture; there must be forfeiture before the right accrues to sue for the forfeited penalty. This is in accord with what was said in Thornton v. Schreiber, 124 U. S. 621, 8 Sup. Ct. 622, 31 L. Ed. 580, viz.: "We, however, think that the word 'found' means that there must be a time before the cause of action accrues at

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which they are found in the possession of the defendant." That such expression was not necessary to the decision of that case is asserted; but in view of the fact that the supreme court, when discussing Thornton v. Schreiber in Bolles v. Outing Co., supra, took no occasion to dissent from such construction, and that no correction was made of the statement, in the opinion of the court below then being reviewed, "that the observation must be regarded as the deliberate opinion of the court" (see Bolles v. Outing Co., 77 Fed. 968, 23 C. C. A. 594), we are warranted in holding, as the court below did, that no right of action had accrued to the plaintiff when his action of assumpsit was begun, and that such view is in accord with the expressed views of the supreme court of the United States. The judgment of the court is affirmed.

(107 Fed. 141.)

L. E. WATERMAN CO. v. PARKER PEN CO.

(Circuit Court of Appeals, Third Circuit. March 22, 1901.)

No. 23.

FEDERAL COURTS—PATENT INFRINGEMENT—FOREIGN CORPORATION—PROCESS—SERVICE—VACATION—FINAL ORDER—APPEAL.

Act Cong. March 3, 1897 (29 St. 695), defining the jurisdiction of United States circuit courts in patent cases, provides that suit may be brought in any district in which the defendant shall have committed acts of infringement and have a regular and established place of business. *Held*, that where it did not appear from an order sustaining a motion to set aside process served on a foreign corporation in an action for infringement of patent, on the ground that the place where it was served was not defendant's place of business, that defendant did not have a place of business within the district in which the suit was brought, the order vacating the service was not a final decision or decree from which an appeal would lie to the circuit court of appeals.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

Fred C. Hanford, for appellant.

Wm. B. Whitney, for appellee.

Before GRAY, Circuit Judge, and BRADFORD and McPHERSON, District Judges.

BRADFORD, District Judge. The matter before us for decision is a motion to dismiss the appeal of the L. E. Waterman Company from an order of the circuit court for the eastern district of Pennsylvania setting aside the service of a subpœna ad respondendum, in a suit brought by that company against The Parker Pen Company, the appellee. 100 Fed. 544. The bill charges infringement of certain letters patent owned by the complainant for improvements in fountain pens, and contains the usual prayers for profits, damages and an injunction. The Waterman company is a corporation of New York and the Parker company is a corporation of Wisconsin. The

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second paragraph of the stating part of the bill contains the following averments:

"The said defendant has, and at all the times hereinafter mentioned had, a regular and established place of business in the City of Philadelphia, State of Pennsylvania, and Eastern District of Pennsylvania, and the acts of infringement hereinafter complained of, or some of them, were committed in said City of Philadelphia, State of Pennsylvania, in the Eastern District of Pennsylvania."

The marshal made return on the subpœna he had served the same on the Parker company in Philadelphia "at the place of business of said company, in the National Export Exposition, by giving a true and attested copy thereof to William A. Schacht, agent in charge, and making known the contents of same to him." The defendant subsequently caused a special appearance to be entered for it "for the purpose, and only for the purpose, of objecting to the jurisdiction of this court," and thereafter the defendant's solicitor, pursuant to due notice, submitted a motion supported by affidavits for an order vacating and setting aside the service of process upon the defendant in this and another suit between the same parties. The motion was granted; the order being as follows:

"And now, this 16th day of February, 1900, on motion of counsel for the defendant, it is ordered that the service of process in each of these cases be vacated and set aside."

From this order the present appeal was taken. The motion to dismiss is based on two alternative grounds, namely, (1) that the order was not a final decision or decree from which an appeal would lie, and (2) that, if it should be held a final decision or decree, the case is one in which the jurisdiction of the circuit court was in issue, and an appeal would lie only to the supreme court. Under the provisions of the act establishing the circuit courts of appeals, as it stood at the time this appeal was taken and now stands, save in certain excepted cases with which we are not here concerned, an appeal lies to this court only from a "final decision" of the lower court. This phrase means a final decree or a final judgment, as the case may be. We do not regard the order appealed from either in form or in substance as a final decree. The precise question involved in the decision of the motion for the order is clearly indicated by the following language of the learned judge below:

"This return is not conclusive of the question whether the place to which it refers was or was not a regular and established place of business of the defendant; and if it was not in fact such a place, no valid service has been made."

The point before the court below for determination was whether there had been a valid service of the subpœna, and it was held that such service had not been effected for the reason that the space occupied by the defendant in the National Export Exposition in Philadelphia was not a regular and established place of business of the defendant, and therefore service could not validly be made on Schacht, who was in charge of such space. The learned circuit judge evidently did not consider the decision of the motion before him as necessarily a final disposition of the suit. If he had taken that view,

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it is fair to assume that the order setting aside would have been followed by or incorporated in a decree dismissing the bill. The act of March 3, 1897, entitled "An Act Defining the jurisdiction of the United States circuit courts in cases brought for the infringement of letters patent" (29 Stat. 695), provides as follows:

"That in suits brought for the infringement of letters patent the circuit courts of the United States shall have jurisdiction, in law or in equity, in the district of which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership, or corporation, shall have committed acts of infringement and have a regular and established place of business. If such suit is brought in a district of which the defendant is not an inhabitant, but in which such defendant has a regular and established place of business, service of process, summons, or subpœna upon the defendant may be made by service upon the agent or agents engaged in conducting such business in the district in which suit is brought."

The bill does not state that the defendant had only one regular and established place of business in Philadelphia, and that such place was in the National Export Exposition. The exposition is not mentioned in the bill. The averment is that the defendant had a regular and established place of business in Philadelphia, and that acts of infringement had been committed by the defendant in that city. It by no means follows that, because the defendant had not such a place of business in the exposition, it might not have had one or more such places of business elsewhere in Philadelphia; nor are we ready to hold that because one writ of subpœna in this case has proved ineffectual valid service of another may not be made. We therefore do not regard the order appealed from as in any sense a final decree either in substance or in form. This conclusion is supported by the authorities. In re Grossmayer, 177 U. S. 48, 20 Sup. Ct. 535, 44 L. Ed. 665; Ex parte Schollenberger, 96 U. S. 369, 24 L. Ed. 853. But it is unnecessary further to pursue this line of discussion; for the appellant is confronted with a dilemma fatal to this appeal. From a final decree of a circuit or district court on a question of jurisdiction, whether of the cause or of the person, the appeal lies directly to the supreme court, and this court is without jurisdiction to entertain it. Shepard v. Adams, 168 U. S. 618, 18 Sup. Ct. 214, 42 L. Ed. 602. The order of the court below setting aside service of the subpœna was either a final decree or it was not. If it was not, no appeal lay to this court. If it was, this court is without jurisdiction in the premises, the appeal lying only to the supreme court. In neither aspect of the case can the appeal be sustained. The motion to dismiss is granted.

J. B. McPHERSON, District Judge. I concur in the result reached in the opinion of the majority of the court, but I would dismiss the appeal upon the ground that the jurisdiction of the circuit court was directly in question, and, therefore, that the appellant's remedy should have been sought in the supreme court of the United States. My reasons are as follows:

The Parker Pen Company was an exhibitor at the National Export Exposition,—a commercial fair held in the city of Philadelphia during part of the year 1899,—and occupied a small space in one of

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the buildings used by the exposition. During the fair the Pen Company sold several fountain pens to one person, at least; and this sale, it is alleged by the complainant, infringed certain letters patent now belonging to the Waterman Company. The complainant thereupon filed a bill in equity in the circuit court for the Eastern district of Pennsylvania, averring that the defendant had a regular, established place of business in the district, and caused the subpœna to be served upon William Schacht, who was asserted to be the agent conducting such business. The defendant is a corporation of the state of Wisconsin, and this action was brought in the state of Pennsylvania by virtue of the act of 1897 (29 Stat. 695; 2 Supp. Rev. St. p. 615). This statute enlarges the jurisdiction of the circuit courts by providing that suits at law or in equity for the infringement of letters patent may be brought in any district in which acts of infringement have been committed, and in which, also, the defendant has a regular and established place of business, although he may not be an inhabitant of such district. When the suit is brought in a district of which the defendant is not an inhabitant, but in which he has a regular and established place of business, service of the summons or of the subpœna may be made upon the agent conducting such business in the district in which suit is begun. After the service of the subpœna in the present case upon William Schacht, an appearance was entered for the defendant "for the purpose, and only for the purpose, of objecting to the jurisdiction of this court"; and shortly thereafter the defendant moved to vacate and set aside the service, supporting the motion by a direct attack upon the jurisdiction, on the single ground that the defendant did not have a regular and established place of business within this district. It was not asserted that any other place of business than the Export Exposition was in question, and in point of fact, as the affidavits show, no other place was in controversy. The defendant's affidavits averred—and there was no denial of the averment—not merely that the place of exhibition was not a regular and established place of business, but that the defendant had no such place of business anywhere in the district. The learned judge of the circuit court considered these affidavits, and sustained the motion, in an opinion to be found in 100 Fed. 544, setting aside the service of the subpœna. From this order the present appeal is taken, and the defendant's motion to dismiss is supported by the argument that the jurisdiction of the circuit court was the only matter at issue before that tribunal, and therefore that the appeal should have been taken directly to the supreme court of the United States. It is conceded by the complainant that, if the jurisdiction of the court below was the point at issue, the motion to dismiss must prevail (U. S. v. Jahn, 155 U. S. 109, 15 Sup. Ct. 39, 39 L. Ed. 87); and the matter for our consideration, therefore, is whether the jurisdiction was in issue, and was finally determined by the order setting the service aside.

Upon this point I entertain no doubt. It seems clear to me that the jurisdiction of the circuit court was directly and completely questioned by the motion to set aside the service of the subpœna on the ground that the defendant had no regular and established place of

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business in the district. It was not simply a particular place of business that was put in issue, but the broad assertion was made that there was no regular and established place of business whatever to be found in the district. The right of the court to entertain the complainant's bill depended in a material part upon the fact that the defendant had such a place of business in the district; for, if this fact did not exist, the act of 1897 did not apply, and the suit could not be brought in the state of Pennsylvania. It is manifest that the question of jurisdiction might be raised at any stage of the proceeding, and I think it might be brought to the attention of the court, either by plea or upon final hearing, or, as it was brought in the present case, by a motion to set aside the service of the subpœna. In my opinion, the form in which the matter is brought before the court is not of controlling importance. If the substance of the inquiry, whatever the form may be, is concerning the jurisdictional fact whether the defendant has a regular and established place of business within the district, then, unquestionably, as it seems to me, the jurisdiction of the court is at once brought into question, and a decision of the inquiry must either sustain or refuse to sustain the right of the court to hear and determine the suit. If the motion should be to set aside the service upon the ground that it has been irregularly made, or that the person upon whom service was made is not such an agent as is contemplated by the statute, other questions might arise, to which no attention need now be paid; but when the service is directly attacked upon the ground that the right to make it never existed, because the complainant never had a right to file the bill, for the reason that the defendant had no regular and established place of business within the district, a direct attack is thereby made upon the jurisdiction of the court, and a decision setting aside the service upon the ground thus set up decides the right of the court to hear and determine the controversy. Service cannot be made upon an agent unless the defendant has a regular and established place of business within the district, and, as already said, this is also a necessary prerequisite to the right to begin the suit.

The fact that the circuit court did not dismiss the bill is not material. Having determined that it had no jurisdiction, it might have made such an order, but the ground of its decision is not altered by the fact that no decree of dismissal has yet been entered. The cases of Fairbank v. Railway Co., 4 C. C. A. 403, 54 Fed. 420, 38 L. R. A. 271, and American Cereal Co. v. Eli Pettijohn Cereal Co. (C. C.) 70 Fed. 276, are obviously not in point.

For the foregoing reasons, I am of opinion that the present appeal should have been taken directly to the supreme court of the United States, and upon this ground I agree that the appeal should be dismissed.

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(107 Fed. 146.)

THE MERIDA (two cases).

(Circuit Court of Appeals, Second Circuit. January 22, 1901.)

Nos. 12, 13.

SHIPPING—CARGO DAMAGES—LIABILITY OF SHIPOWNERS.

A cargo of hides and similar articles shipped from South American ports to New York was found at the conclusion of an unusually long voyage, during warm weather, to be seriously damaged from decay. The bills of lading recited that the cargo was received in apparent good order and condition. The cargo owners alleged that the damage was caused by sea water entering the ship through some defect or unfitness, or by want of proper care, while the defense was that the injury resulted from sweating, heat, or natural decay, or from latent defects or dampness existing prior to shipment. The voyage was without storms or unusual weather. *Held*, upon a consideration of all the evidence, that there was no damage by sea water through any leaks or imperfection of the ship, which was shown to be in good condition and thoroughly equipped for the removal of any accumulation of water in the bilges, which nothing in the circumstances of the voyage rendered excessive; that the damage was due either to an excess of moisture in the cargo before shipment, which produced the decay during the long voyage, or to an accumulation of water in the bilges because of their not having been given proper attention by reason of the sickness and death of three of the engineers from yellow fever during the voyage, in which case the failure to use the pumps was a fault in the management of the vessel, for which the owners were exempted from liability by section 3 of the Harter act.

Appeals from the District Court of the United States for the Southern District of New York.

Two libels were brought in the district court for the Southern district of New York against the steamship Merida to recover the damages sustained to consignments of hides and bales of horse hair and glue stock shipped to the different libelants on the steamship in May and June, 1898, and arriving in New York in a damaged condition on July 22, 1898. The libels were tried together upon one record, and were dismissed. Each libelant appealed to this court.

Charles C. Burlingham, for appellant United States Leather Co.
Wilhelmus Mynderse, for appellants Wilder and others.
J. Parker Kirlin, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. In May, 1898, at Buenos Ayres, the steamship took on board 2,000 hides shipped to Weil Bros., which were stowed in the "spare bunker,"—a part of No. 2 lower hold partitioned off by a temporary wooden bulkhead, and sometimes used for carrying coal. At Rosario, from June 2d to June 4th, the steamer took on board 19,928 hides shipped to the United States Leather Company, which were stowed for the most part in No. 2, while a few were stowed in No. 3, and also took 2,500 hides of C. Moench & Son, which were stowed in No. 3, all in the lower hold. At Montevideo, on June 7th, the steamer took 20,000 hides consigned to the leather company, 10 bales of horse hair and 141 bales of glue stock consigned to Enos

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Wilder, and 2,088 hides and 13 bales of horse hair consigned to Oelrichs & Co. The Montevideo hides, glue stock, and hair were stowed in No. 2 and No. 3,—some in the lower hold and some in the between-decks. Upon reaching New York, 56 per cent. of the Weil hides, 6 per cent. of the leather company hides, 18 per cent. of the 4,588 hides shipped to the other consignees, 33 bales of glue stock, and 15 bales of horse hair were found to have been damaged. The bills of lading recited that the goods were shipped in apparent good order and condition. Each libel alleged that the damage was caused by sea water entering the ship through some defect or unfitness or by want of care in the custody, care, and delivery of the goods. The answers alleged as a defense:

"The provisions in the bill of lading, and which exempted the ship from the consequences of damage arising from sweating, natural decay, all damage or injury, while on board craft or in store, perils of the seas, rivers, or navigation, of whatever nature or kind soever, * * * and that the condition of the goods on arrival was the result of sweating, heat, or natural decay due to the inherent or natural condition of the goods, or latent dampness thereof due to the wetting in craft coming to the ship, or while in store or on shore, or to latent defects in the curing thereof. By an amendment to the answer, the claimant averred that the owners of the said vessel had used due diligence to make her seaworthy, and to have her properly outfitted and equipped for the voyage, and invoked the protection of the Harter act."

The damaged goods were either worthless or were materially injured, by entire or partial offensive decay; and the question of fact was whether this injury was owing to having been wetted by sea water on the voyage, or to heat and decay caused by wetness or insufficient curing before shipment. Upon this question the experts differed materially. On the part of the libelants, the experts urged that the mass of wetness which was manifest to them in the injured hides, and the destruction which it had caused, showed the presence of water in quantities, while an injury caused by the existence of dampness or incomplete drying after the usual arsenical bath before shipment universally manifests itself in a heat damage, which creates a hardness and stops the pores in the hide so that it will not absorb tan bark; but the witness for the libelants, of perhaps the largest experience and knowledge, said (what is obviously true) that a lot of hide put in the hold of a vessel in a very moist or thoroughly wet condition, and remaining there two months, would become rotten on the voyage. The experts for the claimants were of opinion that the damage was by the heating or fermentation, during an unusually long voyage in hot weather, of a portion of the hides, which had been either insufficiently cured, or had not been adequately dried after the arsenical bath, and pointed to the fact that hides damaged by sea water are cold when taken from the hold, whereas it was substantially proved that the damaged hides in the Merida were hot and emitted steam. On the other hand, there is no evidence from those who handled the hides when they were received by the steamship of any manifestation of dampness, while there is testimony of care used in the inspection when they were stowed in the hold, and of their apparent dryness. In this conflict of opinions, it is important to ascertain whether the goods were in fact subjected on board the vessel to

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sea water, and, if they were, whether the water came from leaks, or from carelessness in the management of the vessel by officers or engineers. An effort was made to show leakage through a thin iron deck, either when the decks were washed or during storms, but without success. The voyage was without storms or unusual weather, and would have been uneventful were it not that after the vessel left Rio Janeiro yellow fever broke out, and three of the engineers died. At San Lucca, where the vessel stopped for coal, she was detained nine days in quarantine, so that the voyage was prolonged. The steamer's hull was also tight, as were also the iron between-decks, and after the arrival of the vessel in New York the existence of a supposed leak on the beams under the main deck, or of rusty stains, was clearly disproved. In discussing the probabilities of a leak through the main deck or the between-decks, the district judge commented upon the fact that there was no damage in the wings, where it would naturally have been the greatest from the rolling of the ship, and said that the damage was greatest in the lower half of the lower hold, in a space occupying from two to ten feet above the bottom, and not extending to the wings on either side, but confined mainly to the "heart of the ship." The expression "heart of the ship" is commented upon by the libelants as inaccurate, but it is evident that it was used with relation to the location of the severe damage. There was little or no damage in the wings. For a more precise statement of the location we adopt that given by Boyce, the head stevedore, whose opportunities for observation in No. 3 were abundant and were improved. He says that the damage in No. 3 lower hold was about nine or ten feet in breadth from the amidships to the side, and that the damage was greater four or five feet up from the bottom than on the bottom, and was from five to seven feet in thickness. The damage ran from the amidships to the wing, worse in the middle of the floor than it was near the wing, and commenced about eight feet below the between-decks. We hold, in accordance with the testimony of Hayes, the foreman stevedore, who says that the hides in the No. 2 between-decks were dry, that the damage did not begin until about ten feet below the between-decks, and that its area was about eight or nine feet long and about four or five feet wide, the forward part was three or four feet from the bulkhead, and ran back to the wooden bulkhead of the bunker, and that there was no damage in the extreme wings. The dunnage was from eight to ten inches upon a floor over the ballast tank. We agree with the district judge that there was little or no damage in the between-decks. No accumulation of bilge water could reach the hides, if any ordinary attention had been given to the soundings; and it is certain that the coffee, a sensitive cargo, was stowed on the dunnage in No. 4, and reached New York in safety, though the ship was some feet by the stern from Rio to New York. The surviving engineer testifies that the different compartments were sounded daily to see if water was in them, and that there was no water in any of the holds during the voyage, except in the after well, in the extreme stern of the ship, where it was pumped out every four hours. There was no testimony in regard to an accumulation at the time of the removal of the cargo. The testimony in regard to water

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in the bilges ten days after the vessel arrived is not of weight. We concur with the district court that there was no damage by sea water through any leaks or imperfection of the ship, and are also of opinion that, if damage occurred from causes having their origin in the ship, it occurred through an accumulation of water in the bilges. If it did not occur from this cause, it was occasioned by an excess of moisture in some of the hides before shipment, which were closely stowed in the hold for an unusually long voyage. These hides became heated, decay followed, and the mischief spread. The ship was thoroughly equipped so as to remove an accumulation in the bilges, which nothing in the circumstances of the voyage rendered excessive. The existence of water from this source could have been easily ascertained, and the water could have been removed, for the sluices and pumps were in working order. It is possible that when three engineers were prostrate with yellow fever the ordinary precautions were neglected, but, if they were, the failure to make use of the pumps was a fault in the management of the vessel, with the result that the ship is exempted from liability by the provisions of the third section of the Harter act. The British King (D. C.) 89 Fed. 872; Id., 92 Fed. 1018, 35 C. C. A. 159.

Inasmuch as the claimants have shown affirmatively the facts which exempt the ship from liability, they were entitled to decrees in their favor. The decrees of the district court are affirmed, with costs.

(107 Fed. 157.)

THE PATRIA.

(Circuit Court of Appeals, Second Circuit. January 8, 1901.)

No. 28.

1. COLLISION—FOG—STEAMER AT FAULT—LOOKOUT.

A schooner, sailing closehauled at the speed of about three knots an hour, came into collision with a steamer, about 20 miles off Fire Island, in a thick fog, about 2 p. m. When the fog set in about half an hour before collision, the steamer slackened to half speed, which was about seven knots, and the only lookout prior to the collision was the first lieutenant, who stood on the bridge. The lieutenant heard the schooner's fog horn, and, looking in the direction from whence the sound came, saw the schooner's topmast on the starboard side, whereupon, at his signal, the steamer was at once reversed full speed, and three blasts of the whistle blown. The distance between the schooner and the steamer, when first seen, was about 80 meters. The schooner executed no maneuver after hearing the whistles of the steamer, and the schooner's master testified that the steamer was about 600 feet away when he first saw her. The seamen of the steamer, located forward of the bridge, did not see the schooner prior to the reversing of her engines, but were engaged in other work, and were not on the lookout. *Held*, that the steamer was at fault for the collision in failing to maintain a proper lookout in the crow's nest or forward of the bridge.

2. SAME—SCHOONER ALSO AT FAULT.

The schooner was also at fault for failure to attempt to avert the collision by luffing as soon as the steamer's signals were heard, in violation of the international rules (Act Aug. 19, 1890; Act May 28, 1894), declaring that when, in consequence of thick weather, the vessel entitled

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to hold her course finds herself so close that a collision cannot be avoided by the action of the giving-way vessel alone, she shall take such action as will best aid to avert collision.

Appeal from the District Court of the United States for the Southern District of New York.

In Admiralty. Libel for collision.

For opinion of district court, see 92 Fed. 411.

These are cross appeals from a decree of the district court, Southern district of New York, holding both vessels in fault for a collision which took place off Fire Island, a little before 2 p. m., September 5, 1898, between the schooner Frances M., of 1,096 tons register, and the Patria, an iron screw steamer of 2,200 French tons register.

Eugene P. Carver, for libelants.

Robert D. Benedict, for the Patria.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. Upon some of the issues there is considerable conflict of testimony. Where this exists, this court will naturally incline to sustain the finding of the district judge, who tried the cause and saw the witnesses. Briefly stated, the essential facts are these: The schooner was sailing closehauled, on the starboard tack. The wind was light from W. N. W., and she was heading S. W. by S., making, in the opinion of her master, including leeway, a true course of from S. S. W. to S. by W. She was going not over three knots. The Patria was on the usual course of steamers bound for New York in that locality,—west. About 1:30 p. m. a fog set in, which thickened over the water, though remaining somewhat light overhead. When the fog set in the half-speed signal was rung to the steamer's engine, and thereafter the whistle was blown at intervals of a minute. The speed of the steamer is in dispute. She contends that it was 5½ knots. The district judge reached the conclusion, by inference from facts which he found, that it was 7 knots. While thus proceeding, the first lieutenant, who was on the bridge and at the moment in charge of the navigation, the captain having gone to his room to get a heavy coat, heard a fog horn on the starboard hand, and, looking in the direction whence it came, saw the schooner's topmast. He at once rang the telegraph to the engine room to back the engine at full speed, the helm hard a-port, and gave three blasts on the whistle. Almost immediately the captain repeated the orders to the engine room, and himself blew three blasts. The testimony from the steamer gives the distance at which the schooner was first heard and seen at about 80 meters. The first signal to the engine room was at once obeyed, and the Patria was under reversed engines, full speed, until collision. No other maneuver was executed by her, but the reversed screw threw her head about three points to starboard. The schooner heard the whistles of the Patria before she sighted her. How often is much in dispute. Her master stood between the main and mizzen rigging, and tried to locate the sound. To him the steamer appeared out of the fog coming just about abeam, on a little angle forward towards the schooner's bow. He estimates that she was 600

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feet away when he first saw her. No maneuver was executed by the schooner. The vessels came together, the steamer striking the schooner a little abaft the foremast, cutting into her waterway about 12 or 14 inches. As the vessels came apart after the impact, the schooner proceeded on her starboard tack across the steamer's bow. Thereafter she tacked in order to keep the injured part out of water.

The district judge found the steamer in fault for excessive speed and for not having a proper lookout. It is unnecessary to discuss the first of these assigned faults. We are inclined to the opinion that her speed was not quite so great as the district judge found. As to the other fault, there is no dispute as to the facts. The only stationed lookout was on the bridge, about 30 odd meters from the stern, for the reason, as the captain states, that "in foggy weather you can see much better from the bridge than you can from down forward." There were men working on the forward part of the ship. One seaman, Huertel, was cleaning a winch at the foremast between the bridge and the forecastle. From where he stood he could not see over the forecastle without standing on the winch. There were some passengers on the port side near the rail, laughing and singing. He neither heard nor saw her until after the lieutenant began maneuvering with the telegraph. Another seaman, Hamon, was cleaning winch No. 2, forward side. He saw and heard nothing of the schooner until after he felt the reversing motion of the steamer. A third seaman, Furet, was cleaning the forward winch at top-gallant forecastle, simply attending to his duties, not trying to look out. He did not see or hear the schooner until after the reversing signal sounded. One passenger, somewhat scared at the fog, was standing on deck within a yard or two yards of the bridge stairs. He saw the schooner apparently about the same time as those on the bridge. Another passenger, Di Lauro, was standing on the deck near the starboard rail, quite near the forecastle. He saw the schooner all at once, not "the sails before the hull," but heard nothing from her.

The necessity of a stationed lookout (or lookouts, if the exigency arises for more than one) is well recognized in the authorities, and it has been held a fault calling for condemnation when a vessel fails to maintain one equal to the emergencies likely to arise in a dark night or when there is a dense fog. The Colorado, 91 U. S. 698, 23 L. Ed. 379. It is true that vessels have frequently been relieved from contribution when it has appeared that the imperfection or even absence of a lookout in no way contributed to produce the collision; but that must be very plainly apparent. Here we have a case where the hidden schooner was first heard and seen by those on the bridge when she was about 80 meters distant. There was no lookout in the crow's nest nor in the bows; and who can tell that, even though the fog was heavy below and lighter above, one thus placed would not have heard one, at least, of the earlier blasts of the schooner's horn, and thus given a warning which, by stopping the engines, would have made their subsequent reversal much more quickly effectual in giving sternway? The fact that the unskilled passengers, and the seamen, whose attention was occupied with other things, heard and saw nothing, is not persuasive that nothing would have been seen and heard by a look-

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out, a hundred feet or more forward of the bridge, sufficiently earlier to give the few seconds necessary to avoid the catastrophe; for the evidence satisfies us that, even if the steamer was not actually stopped at the moment of impact, she was moving so slowly that a few feet, or a few seconds, would represent the margin between collision and safety. We concur with the district judge in holding the steamer in fault for failure to keep any stationed lookout forward of the bridge.

The schooner was held in fault for failing to take any action to avert collision. She was the privileged vessel, and she held her course. The international rules in force at the time (Act Aug. 19, 1890; Act May 28, 1894) provided that (article 21):

"Where, by any of these rules, one of two vessels is to keep out of the way the other shall keep her course and speed. Note.—When, in consequence of thick weather or other causes, such vessel finds herself so close that collision can not be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision."

The district judge has fully discussed this branch of the case. It is quite plain upon the proof that, while the vessels were some 270 feet apart, the steamer apprised the schooner by her three-whistle signal (which the schooner's master says he "does not remember he heard") that she was backing her engines, although she was herself still moving forward, and that every foot the schooner might gain to the westward would be a step towards averting the collision. Under these circumstances, the amended rule required her to make the effort, by luffing, to creep as much further away as she could; and, despite the fact that she was going slowly, and could not expect to run up into the wind as nimbly as she might have done had it been fresher, the Patria at the moment of impact was so near to gathering sternway that it seems a fair inference the collision would have been avoided or reduced to trivial results. The circumstances that the schooner, despite the push to windward which her bow received from the blow, continued on her course, and that she tacked immediately afterwards, are persuasive to the conclusion that she had headway enough to edge herself a little further to the west.

Upon the questions presented as to the propriety of certain items of costs, we concur in the opinion of the district judge. The decree of the district judge is affirmed.

(107 Fed. 161.)

ROWAN et al. v. IDE.

(Circuit Court of Appeals, Fifth Circuit. March 26, 1901.)

No. 1,024.

1. STATUTES—JUDICIARY ACT—AMENDMENT—REPEAL—JURISDICTION OF CIRCUIT COURT OF APPEALS.

Section 7 of the judiciary act of March 3, 1891, relating to the jurisdiction of the circuit courts of appeals, was amended by Act Feb. 18, 1895, "to read as follows * * *," and by Act June 6, 1900, the original section was again amended "to read as follows * * *." *Held*, that the original section and the amendatory act of 1895 were necessarily

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repealed by the later act, though it did not declare in terms the repeal of either.[1]

2. CIRCUIT COURT OF APPEALS—JURISDICTION—APPEALABLE ORDER.
An order or decree refusing to dissolve, discharge, or vacate an injunction is not an order continuing the injunction, within Act June 6, 1900, giving the circuit court of appeals jurisdiction of such orders on appeal.

3. SAME—APPEAL FROM INJUNCTIONAL ORDER—DISMISSAL.
An appeal to the circuit court of appeals from an order granting an injunction should be dismissed if not taken within 30 days, as required by Act June 6, 1900.

Appeal from the Circuit Court of the United States for the Northern District of Alabama.

This is an appeal from an interlocutory order entered in an equity case. The matters charged in the bill of complaint, briefly stated, are as follows: The complainant, E. T. Ide, is a citizen of the state of Vermont. Some time prior to the filing of the bill, one Edwin Underwood, who is also a citizen of Vermont, arranged with the defendant B. F. Richardson, a citizen of Massachusetts, that 50 shares of the capital stock of the defendant the Tredegar National Bank, owned by the former, should be transferred on the books of the company to, and a certificate therefor issued in the name of, the latter, and by him indorsed in blank to the former. This was done. Some time in September, 1900, Underwood authorized Richardson to sell this stock for him for $106 a share. On September 20th Richardson gave an option to the defendant Crosby, who is also a citizen of Massachusetts, to take this stock at $106 a share at any time within ten days or two weeks. The bill alleges that Underwood refused to recognize Richardson's right to give this option, and further alleges that on September 24th Underwood "sold, transferred, and assigned" the stock to the complainant for $5,100, which was paid at the time of sale. The bill goes on to allege that the certificate for the stock was in Underwood's safe in Boston, and, when the stock was sold to the complainant, Underwood informed Richardson of that fact, and sent him the keys of the safe, requesting him to obtain the certificate and return it to him for delivery, and that Richardson, instead of doing as requested, handed the certificate to Crosby, and received from him the price he had agreed to pay. It is further alleged that Underwood refused to receive this money from Richardson, and directed him to return it to Crosby, and that Richardson did so tender it, and demanded that the certificate of stock be surrendered, which Crosby refused and still refuses to do. The bill further alleges that Crosby purchased the stock as the agent of, and holds it in trust for, the other defendants; that the defendants propose to have the stock transferred on the books of the bank to the name of some one of them, and to vote at an approaching stockholders' meeting; that the object of the defendants is to obtain control of the bank, and to exclude the complainant and other stockholders from participation in its management, to the irreparable injury of the complainant and of the bank. The relief prayed is (1) that the defendants be enjoined from assigning the stock or having it transferred to them on the books of the company, and from voting or attempting to vote the same at any stockholders' meeting; (2) that the transfer to the defendant Crosby be declared null and void, and that the defendants be required to surrender it up to be canceled; and (3) that a certificate for the stock be decreed to be issued to the complainant.

October 10, 1900, the bill was presented to the Honorable John Bruce, district judge of the district, who forthwith issued the injunction prayed for, without notice, and without hearing, and without bond. An application to dissolve and discharge this injunction was filed on October 24, 1900, based on grounds as follows:

"(1) That there is no equity in the bill of complaint. (2) That the said injunction was granted improvidently and without notice to the defendants, and

[1] Amendment of amended, repealed, or invalid statutes, see note to Wire Co. v. Boyce, 44 C. C. A. 590.

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without showing that irreparable damage would ensue from delay in granting said injunction after notice. (3) On the ground that the complainant has a plain, adequate, and complete remedy at law. (4) That the said bill fails to set up any facts sufficient which entitle the complainant to the interposition of a court of equity. (5) That this court has no jurisdiction of said cause, because indispensable parties cannot be made parties to the said bill, on account of nonresidence."

Notice was given of this motion, and the same was brought on for hearing before the Honorable David D. Shelby, circuit judge, who on November 7, 1900, entered an order as follows:

"The motion to discharge and dissolve the injunction in this case filed October 24, 1900, having been submitted on briefs, and having been duly considered, it is now ordered, adjudged, and decreed that said motion be overruled, but without prejudice to the right of the defendants to renew the motion, if they think proper to do so, before the Honorable John Bruce, district judge, who made the order granting the injunction.

"At chambers, New Orleans, Louisiana, November 6th, 1900.

"David D. Shelby, U. S. Circuit Judge."

On November 15th another motion to discharge and vacate the injunction was made on the following grounds:

"(1) Because the same was granted without notice, and in violation of the law and the rules of the court. (2) That this court has no jurisdiction of the case, because indispensable parties cannot be made parties to the bill; they being nonresidents and citizens of other states, who cannot be sued or made parties. (3) That the bill is without equity."

On the 16th of November the defendants named in the bill filed a general demurrer to the same for want of necessary parties and for want of equity. On December 10, 1900, the following was entered:

"The motion to discharge the injunction in this case filed October 24, 1900, having been argued and submitted, and having been duly considered, it is now ordered, adjudged, and decreed that said motion be denied and overruled, and that respondents making the same pay all the costs thereof, for which execution may issue.

"At chambers, Montgomery, Alabama, Dec. 10, 1900.

"John Bruce, U. S. District Judge."

On December 17th an appeal was allowed as follows:

"Whereas, motion having been made to dissolve and discharge an injunction heretofore granted against the defendants in said cause; and whereas, the motion was, on the hearing thereof, denied; and whereas, an appeal is desired by the defendants making said motion, from said order,—it is ordered that an appeal from said order refusing to discharge and dissolve said injunction, to the circuit court of appeals for the Fifth circuit, be allowed George H. Rowan and John F. Rowan and others, the defendants herein making said motion, returnable to the present term of the U. S. circuit court of appeals for the Fifth circuit, on giving bond in the sum of two hundred ($200) dollars, conditioned according to law; such appeal, however, not to operate as a supersedeas."

On the 8th of February, 1901, the appellee appeared in this court and moved to dismiss the appeal on the following grounds, to wit:

"(1) For that the order from which this appeal was taken was rendered more than thirty days before the taking of the same, and is therefore barred. (2) For that said order will not support an appeal. (3) For that this court is without jurisdiction to entertain said appeal."

Afterwards the appellee, on leave of the court, supplemented the above with the following:

"(4) No assignment of errors was filed in the lower court at or before the taking of the appeal or since."

On the 11th of February counsel for appellants filed in this court a motion as follows:

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"Peyton Rowan and others, appellants in the above cause, move the court for a mandamus to the lower court, or for a prohibition or other remedial writ, commanding the vacation and disssolution of the injunction heretofore granted therein."

W. A. Gunter, for appellants.
Sydney J. Bowie, for appellee.

Before PARDEE, Circuit Judge, and NEWMAN and TOULMIN, District Judges.

PARDEE, Circuit Judge (after stating the facts as above). Although we have heard much argument, orally and by brief, on many matters supposed to be involved, we do not find it necessary to determine whether the injunction issued on October 10, 1900, without notice or hearing and without bond, should be construed as a restraining order issued under the authority of section 718, Rev. St. U. S., or was a special injunction issued in violation of the fifty-fifth equity rule, or whether the appeal in this case was intended to be from the order of the circuit judge refusing to discharge and dissolve the said injunction, or from the order of the district judge refusing to vacate and discharge the injunction, or whether an order refusing to vacate and discharge an injunction is equivalent to an order refusing to discharge and dissolve an injunction; for in any event the appeal in this case must be dismissed. As a general rule, appeals from interlocutory orders made during the pendency of an equity cause are not allowed. Prior to March 3, 1891, they were not allowed at all. In the seventh section of the judiciary act establishing the circuit court of appeals, approved March 3, 1891, it was enacted:

"Sec. 7. That where, upon a hearing in equity in a district court or in an existing circuit court, an injunction shall be granted or continued by an interlocutory order or decree, in a cause in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction to the circuit court of appeals: provided, that the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court during the pendency of such appeal."

Under this section none of the orders issued in the cause concerning the injunction, save the first, were appealable. This section remained in force until February 18, 1895, when, by act of congress approved on that day, it was amended so as to read as follows:

"That where, upon a hearing in equity in a district court or a circuit court, an injunction shall be granted, continued, refused, or dissolved by an interlocutory order or decree or an application to dissolve an injunction shall be refused in a case in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting, continuing, refusing, dissolving, or refusing to dissolve an injunction to the circuit court of appeals: provided, that the appeal must be taken within thirty days from the entry of such order or decree and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court during the pendency of such appeal: and provided further, that the court below may in its discretion require as a condition of the appeal, an additional injunction bond."

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Under this amendatory act it is probable that all of the orders relating to the injunction—granting it, refusing to discharge and dissolve it, and refusing to discharge and vacate it—were appealable.

On June 6, 1900, another act was passed, by which the original section 7 of the judiciary act of 1891 was again amended and re-enacted so as to read as follows:

"Sec. 7. That where, upon a hearing in equity in a district court or in a circuit court, or by a judge thereof in vacation, an injunction shall be granted or continued or a receiver appointed, by an interlocutory order or decree, in a cause in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction or appointing such receiver to the circuit court of appeals: provided, that the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed, unless otherwise ordered by that court or by the appellate court or a judge thereof, during the pendency of such appeal: provided further, that the court below may in its discretion require as a condition of the appeal an additional bond."

By this amendatory act no repeal in terms was declared either of the original section 7 of the act of 1891 or of the amendatory act of 1895, but we take it to be perfectly clear that as section 7 of the act of 1891 can only read one way, and that way is as last declared by the legislative authority, the original section 7 and the amendatory act of 1895 were necessarily repealed by Act June 6, 1900. See Wire Co. v. Boyce (C. C. A.) 104 Fed. 172.[2] Under this last amendatory act an appeal is authorized from an interlocutory order or decree granting or continuing an injunction upon a hearing in equity in a cause in which an appeal from a final decree may be taken to the circuit court of appeals, but limiting the right of appeal to 30 days from the entry of the order or decree granting or continuing the injunction. The order or decree continuing an injunction, within the meaning of the statute, is an order or decree which has vitality, affecting in some way the rights of the parties, and without which the injunction would either cease to have force or be enlarged or limited in scope. Frequently orders of injunction, under the law and the equity rules, or by terms inserted by the court or judge, are made to expire at specific dates or on the happening of specific events, and in such cases orders continuing the injunction in force are necessary. See section 719, Rev. St., and fifty-fifth equity rule. An order or decree refusing to dissolve or to discharge or to vacate an injunction is not an order continuing an injunction, within the meaning of the amendatory act. It is to be noticed that the act of 1900 and the original section 7 are identical in terms, so far as the right is granted to appeal from orders of injunction. The original section 7 in this respect was construed in Dreutzer v. Land Co., 13 C. C. A. 73, 65 Fed. 642, in which case it was held that an order denying a motion to dissolve was not appealable, and the court said:

"The order denying a motion to dissolve did not continue the injunction. Without such ruling by the court after the filing of the bond, the injunction would have remained in force. The necessity of the ruling of the court

[2] 44 C. C. A. 588.

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arose, not by reason of the order for injunction, but by reason of the motion to dissolve."

In Railroad Co. v. Walker, 15 C. C. A. 188, 68 Fed. 23, it was held that under the act of 1891 an appeal would not lie from an order of court dissolving an injunction. In Wire Co. v. Boyce, supra, it was held that under the last amendatory act an appeal would not lie from an interlocutory order denying an injunction. To hold that an appeal will lie from an order refusing to dissolve an injunction would be to render meaningless the amendatory act of 1895, in which it was deemed necessary to expressly give the right to appeal from an interlocutory order refusing an injunction or dissolving an injunction, or refusing an application to dissolve an injunction. It would also render of no effect the provision in the original and both amendatory acts that appeals must be taken within 30 days from the entry of such order or decree, because, as said in Boston & A. R. Co. v. Pullman's Palace-Car Co., 2 C. C. A. 172, 51 Fed. 305, "it would be, in fact, saying that the parties may suffer the thirty days, expressly limited within which an appeal may be taken, to go by, and then revive the right by motions for rehearing made only to be dismissed."

We conclude that, if the appeal in this case was from the original order granting the injunction, it must be dismissed, because not taken within the 30 days provided by the statute; if it was from either one of the subsequent orders refusing to discharge, to vacate, and to dissolve the injunction, it must be dismissed, because the act of June 6, 1900, contains the whole law on the subject of appeals from interlocutory orders or decrees, and that act does not authorize an appeal from any interlocutory order or decree refusing to dissolve, discharge, or vacate an order of injunction previously granted. The appeal is dismissed.

(107 Fed. 165.)

HEINZE v. BUTTE & B. CONSOL. MIN. CO. et al.

(Circuit Court of Appeals, Ninth Circuit. March 8, 1901.)

No. 677.

1. CIRCUIT COURT OF APPEALS—JURISDICTION—INJUNCTION—STATUTES—AMENDMENT—REPEAL.

The act of June 6, 1900, providing that section 7 of the act of 1891, relating to the jurisdiction of the circuit court of appeals as to injunction cases, should be amended to read as therein prescribed, is valid, notwithstanding it purports to amend a section of the act which had already been amended by the act of February 18, 1895, to which it did not refer, and its enactment necessarily operates to repeal the latter amendment.[1]

2. SAME—APPEALABLE ORDER.

An order appointing a receiver directed a party to deliver to him possession of property in controversy, and enjoined him from interfering with the receiver's possession, and thereafter an order was entered dismissing an application to set the injunction aside. *Held*, that the latter

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[1] Amendment of amended, repealed, or invalid statutes, see note to Wire Co. v. Boyce, 44 C. C. A. 590.

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order was not equivalent to an order continuing the injunction, within the meaning of the act of June 6, 1900, amending section 7 of the judiciary act of 1891 (26 Stat. 828), and authorizing appeals from such orders to the circuit court of appeals.

Appeal from the Circuit Court of the United States for the District of Montana.

On October 6, 1897, the Butte & Boston Consolidated Mining Company, as complainant, filed a bill in equity against John F. Forbis, as executor of the last will and testament of William J. McNamara, deceased, John McNamara, the Old Colony Trust Company, and others, for the purpose of obtaining partition of the Snohomish and Tramway quartz lodes; the complainant alleging itself to be the owner of one-half of the Snohomish and of two-thirds of the Tramway, and the defendants were alleged to be the owners of the remaining interests. Subsequently F Augustus Heinze intervened in the suit, and set up the fact that he had become the owner, by purchase and conveyance, of the interest alleged to belong to the devisees of William J. McNamara, deceased; and later the said F. Augustus Heinze, as administrator of the estate of James Larkin, deceased, together with Clara A. Larkin, were permitted to intervene and set up the claim that the deed under which the complainant claimed title from James Larkin was obtained while the grantor was insane, and that said interest in fact belonged to the heirs and representatives of said James Larkin. Thereafter, on July 27, 1899, the court appointed a receiver of the interest so in dispute between the complainant and the Larkin estate, with leave to apply for an extension of such receivership over the whole of the property. On March 15, 1900, the receivership was so extended by an order of the court which also directed that F. Augustus Heinze and Arthur P. Heinze, and all parties claiming under them, deliver to the receiver full possession of the said Snohomish and Tramway lode claims, and enjoined them from mining or extracting ores therefrom, or in any way interfering with the possession of the receiver. On November 14, 1900, the appellant filed a motion to vacate and set aside the order of March 15, 1900, and the court thereupon entered an order to the complainant requiring it to show cause why the motion should not be allowed. Thereupon the complainant in the bill, together with the Old Colony Trust Company, one of the defendants, and John S. Harris, the receiver, moved the court to dismiss the appellant's motion and to quash the order to show cause. Upon a hearing had, the court so ordered. The present appeal is taken from the interlocutory order so made and entered on November 19, 1900, granting the motion of the complainant, the Old Colony Trust Company, and the receiver to quash the order made on November 14, 1900, requiring them to show cause why the court should not vacate the order of March 15, 1900, whereby the receivership was extended over the whole of the Snohomish and Tramway lodes, and the appellant was enjoined from mining therein.

Cullen, Day & Cullen, McHatton & Cotter, and James M. Denny, for appellant.

Forbis & Evans, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

A motion is made to dismiss the appeal upon the ground that no appeal lies from the order from which it is attempted to be taken. The right to appeal to the circuit court of appeals from an interlocutory order or decree was created by section 7 of the act which established the court. It was there provided—

"That where, upon a hearing in equity in a district court, or in an existing circuit court, an injunction shall be granted or continued by an interlocutory order or decree, * * * an appeal may be taken from such interlocutory

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order or decree granting or continuing such injunction to the circuit court of appeals." 26 Stat. 828.

By the act of February 18, 1895, section 7 was amended to read as follows:

"That where, upon a hearing in equity in a district court or a circuit court, an injunction shall be granted, continued, refused, or dissolved by an interlocutory order or decree or an application to dissolve an injunction shall be refused * * * an appeal may be taken from such interlocutory order or decree granting, continuing, refusing, dissolving, or refusing to dissolve an injunction to the circuit court of appeals." 2 Supp. Rev. St. p. 376.

By the act of June 6, 1900, it was provided that the seventh section of the act of 1891 be amended to read as follows:

"That where, upon a hearing in equity in a district court or in a circuit court, or by a judge thereof in vacation, an injunction shall be granted or continued or a receiver appointed, by an interlocutory order or decree, * * * an appeal may be taken from such interlocutory order or decree granting or continuing such injunction or appointing such receiver to the circuit court of appeals."

It will be observed that the act of June 6, 1900, amends the seventh section of the judiciary act of 1891, without expressly referring to the amendment of February 18, 1895. We think there can be no doubt that the last act was valid, notwithstanding that it purports to amend a section of the original act which had already been amended by the act of 1895, and that its enactment necessarily operated to repeal the amendment of 1895. Wire Co. v. Boyce (C. C. A.) 104 Fed. 172,[2] and cases there cited. The law, therefore, by which the present motion to dismiss must be ruled, is the act of June 6, 1900; and the question arises whether the appeal in the present instance is an appeal from an order appointing a receiver or granting or continuing an injunction. It is admitted that it is not an appeal from an order appointing a receiver. The order appointing a receiver was made some eight months before the entry of the order which is appealed from. It is contended, however, that the appeal is from an order continuing an injunction, for the reason that the order appointing the receiver proceeded to direct the appellant to deliver to the receiver the possession of the property which is in controversy, and enjoined him from interfering with the receiver's possession; and it is said that by virtue of such provision the order became also an injunction order,—an order from which an appeal might have been taken irrespective of the order appointing the receiver,—and that the action of the court in entering the order which is appealed from, although that order did not embody an injunction or continue an injunction, but dismissed the appellant's application to set aside the injunction, was nevertheless, in its nature, an order continuing an injunction, and was therefore appealable. The appellant cites In re Tampa Suburban R. Co., 168 U. S. 583, 18 Sup. Ct. 177, 42 L. Ed. 589; Association v. Storrow, 34 C. C. A. 182, 92 Fed. 5; American Const. Co. v. Jacksonville, T. & K. W. Ry. Co., 146 U. S. 372, 13 Sup. Ct. 758, 37 L. Ed. 486,—in support of the proposition that, if an order appointing a receiver contains an in-

[2] 44 C. C. A. 588.

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junction against interference with the receiver's possession, an appeal may be taken therefrom as from an order granting an injunction. We think it unnecessary to consider that question. Conceding, for the purposes of this discussion, that the order of March 15, 1900, may be regarded as an order granting an injunction, can it be said that the order of November 14, 1900, which is the order appealed from, was in any sense an order either granting or continuing an injunction? We think not. The intention of the act of 1891 was to create the right of appeal from an injunction order,—an order granting an injunction or subsequently directing that it be continued in force. It does not by its terms extend to an order sustaining or denying a motion to set aside an injunction already granted or dismissing an application to dissolve an injunction, and it has been held that it was not intended by implication to extend to such an order. Dreutzer v. Land Co., 13 C. C. A. 73, 65 Fed. 642. The intention of the original legislation in this respect is made manifest by the terms of the amendment of 1895, whereby express provision was made for appeal from orders granting, continuing, refusing, dissolving, or refusing to dissolve an injunction. In subsequently returning, by the amendment of 1900, to the original provisions of the act, it must be held that congress intended to repeal the more liberal provisions of the amendment of 1895, and to readopt the stricter rule of 1891. It must be presumed that the amendment of 1900 was made in view of, and with special reference to, evils which had been introduced by the amendment of 1895, and for the purpose of curtailing appeals from interlocutory injunction orders. Under the amendment of 1895 no limit was placed to the exercise of the right to move for the dissolution of injunctions, and the right existed to appeal from every ruling upon such a motion. If that amendment had never been enacted, and the right created by section 7 of the judiciary act of 1891 had never been thus enlarged, there might, perhaps, be plausible ground for now urging that the amendment of 1900 was intended to apply to a case such as that now under consideration; but, in view of the amendment of 1895 and its subsequent repeal, there is no room for a liberal construction of the existing statute. The appeal will be dismissed.

(107 Fed. 169.)

FRISHMUTH et al. v. FARMERS' LOAN & TRUST CO.

ANTELO v. SAME.

(Circuit Court of Appeals, Second Circuit. February 27, 1901.)

Nos. 19, 79.

1. APPEAL—REVIEW OF DECREE SUSTAINING DEMURRER—WAIVER BY AMENDMENT.

   A complainant who amends his bill after a demurrer has been sustained thereto cannot have the decree sustaining such demurrer reviewed on appeal from a subsequent decree rendered on the amended bill.

2. LIMITATIONS—STATUTE APPLICABLE—NATURE OF SUIT.

   Where a railroad mortgage executed to a trustee contained no express covenant on the part of the trustee, one cannot be implied, unless clearly

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growing out of the language or the obvious intent of the parties; and a suit by the bondholders secured, against the trustee, for its failure to properly protect their interests, is one for a breach of duty implied by law, and not for a breach of covenant, for the purposes of determining the statute of limitations applicable to such suit.

3. SAME—SUIT FOR BREACH OF TRUST—EFFECT OF AMENDMENT ALLEGING FRAUD.

A railroad company executed and delivered to a trustee bonds, and a mortgage securing the same, upon property yet to be acquired and constructed; the mortgage providing that the bonds should be certified and issued by the trustee from time to time on request of the company, the proceeds to be retained by the trustee, and paid out only on the orders of the company, stating the purpose for which such proceeds were to be used, or that the bonds should be delivered to the company on the like statement; the company covenanting that the bonds or their proceeds should be used only for the purposes contemplated by the mortgage. Holders of the bonds filed a bill against the trustee for relief on the ground that it had certified and issued the bonds without the statements required, and which did not have the security contemplated by the mortgage, by reason of which fact they proved to be worthless. A demurrer to the bill was sustained on the ground that the suit was barred by limitations. *Held*, that the gravamen of the bill was a breach of trust on the part of defendant, and that its nature was not changed by amendments merely adding an allegation that the action of the defendant was fraudulent, so as to convert it into a bill for fraud, against which limitations would not begin to run until the fraud was discovered by complainants.

4. RAILROAD MORTGAGE—DUTY AND LIABILITY OF TRUSTEE.

A trustee in a railroad mortgage cannot be held liable to the bondholders because of its failure to defend a suit for the forfeiture of a land grant to which the company would have been entitled on making a certain payment, where it is not shown that there was any defense, or that the rights of the company had not previously been lost without fault of its defendant.

Appeal from the Circuit Court of the United States for the Southern District of New York.

These two bills in equity, which were brought in the circuit court for the Southern district of New York, are founded upon substantially the same facts, but the legal liability of the defendant is presented in the respective bills in a different form. To each bill the defendant interposed substantially the same demurrers, which were heard by Judge Wallace, who, as will be seen, overruled a part of the demurrers, sustained a portion, and dismissed the bills unless the complainants should see fit by amendment to obviate the objections which were sustained. 95 Fed. 5, 12. Each complainant did thereupon amend, the amended bills were again demurred to, were held not to have been cured, the demurrers were sustained, and the bills were dismissed. The allegations of fact in the bills are voluminous, were stated as briefly as the nature of the case permitted in the opinion of Judge Wallace in the Frishmuth Case, and are as follows:

"The complainants, owners of certain mortgage bonds created by the Oregon Pacific Railroad Company, allege by their bill of complaint that by the neglect and breach of duty of the defendant, the trustee named in the mortgage, they have wholly lost the amount represented by their bonds, and pray for a discovery and an accounting. The bill was filed in January, 1899. The defendant by demurrer objects that the bill does not disclose a cause of action, that there is a defect of parties defendant, that there is a defect of parties complainant, that the suit is barred by the statute of limitation, and that the laches of the complainants, in view of the facts set forth in the bill, preclude any recovery. The mortgage or trust deed is set out in full in the bill of complaint. It was executed October 1, 1880, by the Oregon Pacific Railroad Company as party of the first part, the defendant as party of the

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second part, and the Willamette Valley & Coast Railroad Company as party of the third part, to secure an issue of fifteen thousand bonds, of the denomination of $1,000 each, of that date, payable October 1, 1900, with interest semi-annually, reciting upon the face that they were 'limited in issue to $25,000 per mile' of railroad.

"The Willamette Valley & Coast Railroad Company (hereafter called the 'Willamette Company') was incorporated with authority, among other things, to construct a railroad from Corvallis to Yaquina Bay, in the state of Oregon; had acquired by grant from that state certain lands situate in Benton county, and was entitled to appropriate other lands of the state for station buildings, depots, workshops, etc.; and was also entitled to acquire by the payment of $600,000 a grant from the state of Oregon to the Willamette Valley & Cascade Mountain Wagon-Road Company (hereafter called the 'Wagon-Road Company') covering about eight hundred and fifty thousand acres of land. The Oregon Pacific Railroad Company (hereinafter called the 'Oregon Company') was incorporated with authority, among other things, to construct and operate a railroad from Yaquina Bay to Boisé City, in the state of Oregon; to construct the railroad of the Willamette Company, acquire it, and operate it; and to construct or acquire water craft, and operate the same in connection with its railroads. To secure the payment of the fifteen thousand bonds created by the Oregon Company, that corporation and the Willamette Company joined in the mortgage, and conveyed to the defendant, in trust and upon the covenants therein expressed, their franchises and all their property then existing or thereafter to be acquired. At the date of its execution neither the Oregon Company nor the Willamette Company had any railroad constructed, or had any other property of value to which the lien of the mortgage could attach, except the franchises and land grant of the Willamette Company, and the right of that company, by the payment of $600,000, to become owner of the eight hundred and fifty thousand acres of land included in the grant to the Wagon-Road Company. By the terms of the mortgage the bonds were not to become valid obligations until certified by the trustee, and they were to be deposited by the Oregon Company with the defendant, to be certified and issued from time to time at the request of the Oregon Company as the same should be sold or otherwise disposed of. The mortgage contained covenants on the part of the Oregon Company to do or cause to be done all the acts and things necessary and proper to preserve intact the lien of the mortgage upon all the property conveyed, and to perform all such further acts as the trustee should deem proper and expedient for more effectively securing the payment of the bonds; to apply the proceeds arising from the first three thousand two hundred and fifty bonds issued to it by the trustee, first to the payment of the $600,000 necessary to enable the Willamette Company to acquire the land grant of the Wagon-Road Company, next to the construction and equipment of one hundred and thirty miles of railroad from the ocean eastward, and thereafter any surplus, as well as the proceeds of all the other bonds issued to it by the trustee, to the construction and equipment of the rest of its railroad, the purchase of water craft, and the general purposes of its incorporation. The Oregon Company also covenanted to deposit with the trustee the sum of $30,000 in each year, commencing with the year 1883, to be invested by the trustee as a sinking fund for the purchase of the bonds, and to pay the bonds, principal and interest, according to their terms.

"The provision of the mortgage authorizing the defendant to issue the bonds reads as follows: 'The said trustee may certify and issue any of the said bonds at any time on the request of the party of the first part in writing, and the net proceeds which may be realized upon the sale shall be paid over to and remain in the hands of the said trustee for the purposes above enumerated, and shall be paid out only on the written order of the executive committee of the board of directors of the party of the first part, and all such orders shall include a statement declaring the purpose or purposes for which the proceeds of the bonds so ordered to be paid over are to be appropriated or used: provided, however, that, in case the party of the first part shall desire to apply any of the said bonds for the purposes of its incorporation without converting the same into money, it shall furnish the said trustee with a like written order of the said executive committee, which shall include a

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written statement declaring the purpose or purposes for which the said bonds are to be appropriated or used, and in that case the said trustee shall certify, issue, and deliver the said bonds. Nothing herein contained shall be so construed as requiring the said trustee to inquire into the application of the funds or the bonds which it may deliver over upon the receipt of such orders as aforesaid.' The mortgage contained the usual provisions, in case of a default in the payment of the principal or interest of the bonds, authorizing the trustee, upon the request of the holders of one-fourth of the then outstanding bonds, to enter into and take possession of the mortgaged property and receive the earnings and income thereof, and for the foreclosure and sale of the mortgaged property; and it provided that in case of a foreclosure sale the trustee might become the purchaser, might procure the organization of a new corporation for the benefit of the holders of the bonds upon such terms as a majority of the bondholders should request, and should aid and promote in all lawful ways any plan of such a reorganization. It also contained the following provision: 'That the party of the second part, and its successors or successor in the trust hereby created, shall be responsible only for reasonable diligence in the management thereof, and shall not be accountable in any case for the act or default of any agent, attorney, or employé, when such person shall have been selected with reasonable discretion; and the party of the second part, its successors or successor, shall be entitled to be reimbursed all its proper outlays of any sort and nature by it incurred in the discharge of this trust after the execution of these presents, including reasonable attorney's and counsel fees incurred in that behalf, and shall be entitled to receive a reasonable and proper compensation for any duty it may at any time perform in the discharge of the trusts hereby created.'

"The bill alleges that in May, 1881, the defendant certified and delivered to the Oregon Company three thousand two hundred and fifty of said bonds; that the order for the bonds did not contain any declaration of the purpose for which they were to be used, except the general one that they were to be 'appropriated or used in the purchase of necessary materials for the construction of its lines and the discharge of its obligations, and for other proper purposes of its incorporation'; that at the time of certifying and delivering these bonds the right to acquire the land grant for the eight hundred and fifty thousand acres had expired, and the defendant was aware of the fact; that the Oregon Company did not construct the one hundred and thirty miles of railroad from the Pacific Ocean eastward, but did build and equip only about seventy-two miles of said projected railroad, which was commenced about July, 1881, and completed about October, 1884, and which did not cost the proceeds of twenty-five bonds per mile; that in December, 1884, the defendant, with knowledge that said railroad had been constructed, and that the land grant for the eight hundred and fifty thousand acres had not been acquired, issued and delivered to the Oregon Company one thousand more of the bonds, and shortly afterwards three thousand seven hundred and fifty more, and subsequently, and in June, 1885, all of the remainder of the fifteen thousand bonds; that the orders upon which all of the bonds were thus issued contained only a statement of the purposes for which they or their proceeds were to be appropriated, like that contained in the first order; that after the certification and issue of the fifteen thousand bonds, although the construction of the railroad of the Oregon Company was proceeded with in an inefficient way, only ten more miles of railroad were constructed and equipped until 1886, and sixty miles more by the fall of 1889; that the proceeds of eleven thousand of the bonds were not appropriated by the Oregon Company to the acquisition, construction, or betterment of the mortgaged property, or for any of the purposes in the mortgage declared; that in October, 1890, the Oregon Company became insolvent, and defaulted in paying the interest upon the bonds, and the defendant brought its action for the foreclosure of the mortgage and the appointment of a receiver of the mortgaged property, and in December, 1894, the mortgaged premises were sold under a decree of sale in the action to parties who purchased for their own benefit, and not for that of the holders of the bonds, and a deed of conveyance was executed and delivered to the purchasers, and thereby the holders of the bonds wholly lost all the benefit and security of the mortgage."

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Silas W. Pettitt, for appellants Frishmuth and others.
Wm. Putney, for appellant Antelo.
John E. Parsons and David McClure, for appellee.

Before LACOMBE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge (after stating the facts as above). The circuit judge was of the opinion that the bill stated a good cause of action, and overruled the first demurrer. The grounds upon which he rested his conclusion were that the duties of the defendant, which was a trustee for the benefit of the bondholders, were not simply those which were stated in terms in the mortgage, but were imposed upon and were assumed by the defendant by the fact of trusteeship, and by the situation or obvious nature of the mortgage security. In this case—

"The security was practically in nubibus at the inception of the trust, and was to be created by the co-operation of the defendant and the Oregon Company. It was to be constituted an adequate security by the acquisition of property by the Oregon Company through the proceeds of the bonds to be issued by the trustee. The mortgage was sedulously framed and expressed to induce investors to purchase the bonds upon the faith that such property would be acquired with the proceeds, and that as the bonds were issued by the trustee the proceeds would be devoted by the Oregon Company, under the supervision of the trustee, to feed the security and satisfy the promises set forth in the bonds and in the mortgage covenants. The statement in the bonds that the issue was to be limited to $25,000 per mile of railroad was a promise by the Oregon Company that there should be a mile of completed railroad for every $25,000 of bonds issued. This statement, and also the covenant in respect to the application of the proceeds of the first bonds to be issued, were obviously inserted to assure investors that the security would be adequately augmented concurrently with the issue of the bonds. The only possible object of the provision restricting the trustee from delivering the bonds or their proceeds to the Oregon Company, except on orders declaring the purposes for which they were to be used, was to satisfy the investors that the trustee was to supervise the operations of the Oregon Company in respect to the purposes to which it intended to make application of the proceeds, and thus effectuate the promises of that company. The several provisions imply the power and the duty of the trustee to refuse to issue bonds except when supplied with evidence that the avails are to be used conformably with the promises of the Oregon Company. The defendant cannot escape responsibility to those who have bought the bonds upon the theory that the mortgage does not contain any covenants by the trustee prescribing its conduct except in the event of a default in payment. They are entitled to hold the defendant to the performance of the duties which, from the import of the provisions, they had a right to suppose the trustee would perform. While its terms exonerate the trustee for a misapplication after it has delivered the bonds or proceeds to the Oregon Company upon orders of the requisite character, they do not absolve it further. They certainly do not protect the trustee in delivering bonds or proceeds which it knows or has reason to believe are not to be applied properly. The instrument is not to be construed as authorizing the trustee to deliver the bonds or their proceeds upon orders containing such vague and indefinite declarations as were inserted in those given by the Oregon Company. Upon such a construction the provision conferring authority would afford no security for the bondholders, and would be a mere sham. It was intended to restrict the trustee from delivering bonds or proceeds without information of the specific uses to which, from time to time, they were being applied, in order to enable the trustee to ascertain whether they were being expended conformably to the promises of the Oregon Company."

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The third demurrer was sustained because the action was brought in the name of the complainants alone,—a defect which was subsequently cured by amendment. The fourth and fifth demurrers, that the suit was barred by the statutes of limitations, were sustained because the entire issue of bonds had been delivered by the defendant in June, 1885, 14½ years before the commencement of the action; and, while courts of equity of the United States are not subject to restriction by state statutes, they feel themselves bound, in cases of concurrent jurisdiction, to act in analogy to those statutes. The sixth and seventh demurrers, which set up the defense of laches, were overruled. Judgment was ordered sustaining the third, fourth, and fifth demurrers, and overruling all the others and dismissing the bill unless the complainants saw fit by amendment to obviate the objections. The complainants thereupon amended by adding to the original bill averments that the same acts in regard to certification which had been previously stated were fraudulent, that the certification of the bonds was to enable the Oregon Railroad Company to perpetrate a fraud, and averred the ignorance of the fraud by the complainants and its concealment. The defendant thereupon renewed, in substance, its demurrers; and the circuit court adhered to its original position upon the ground that if the cause was, as before, for the breaches of duty by the defendant, the statute of limitations would defeat the action, but, if the amendment turned the bill into one for fraud, it stated a cause of action which was not common to all the bondholders.

The complainants in the Frishmuth Case treat the amendment as immaterial, and as simply asserting that the acts of the defendant constituted a legal fraud, without changing the cause of action, which was for a breach of covenant, and urge that the decision upon the original bill was erroneous. If the complainants had wished a review of that decree, they should have omitted to amend the bill by the averment in regard to fraud, and should have taken an appeal from the judgment which sustained the demurrers. U. S. v. Boyd, 5 How. 29, 12 L. Ed. 36; Jones v. Thompson, 6 Hill, 621. But, as the complainant is urgent upon the question that the bill as amended is an action upon a sealed instrument for the breach of covenants therein, and therefore the cause of action is not barred, except by analogy to the statute which prescribed a limitation of 20 years, and as the amendment was confessedly immaterial, we will look into the question of the cause of action.

It is clear that the mortgage contained no express covenant against neglect of duty by the trustee. Neither can any implied covenants to that effect be read into its terms. The defendant signed the mortgage and attached its corporate seal for the purpose of expressing its acceptance of the trust. The law imposes upon a trustee the duty of fidelity to the pecuniary interests of the cestuis que trustent, and the necessity for fidelity is measured somewhat by the situation of the trust fund. In the case of this mortgage, as the security was "practically in nubibus," it was the duty of the trustee to see that new bonds were not carelessly and improvidently issued upon vague declarations of the purposes to which they were to be applied. This

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duty was imposed by law from the fact of trusteeship, and was not imposed by covenant. The omission to discharge the obligation was a breach of duty, and may be regarded as a breach of a quasi contract, or contract implied by law. A covenant to discharge the duty was not one which would naturally be inserted in a mortgage between a mortgagor and a trustee, and ought not to be inserted by implication unless clearly growing out of the language or the obvious intent of the parties. In the Antelo Case it is not claimed that the liability of the defendant was for the losses sustained by a breach of covenant, but was for the losses sustained by a breach of its duty. The acts of the trustee which are complained of with respect to the certification of the bonds are the same as in the Frishmuth Case, but the Antelo bill avers that the right to acquire the 850,000 acres existed until the fall of 1894, when it was lost by the neglect of the trustee to defend against a suit to declare the forfeiture of the right. Altschul v. Hogg (C. C.) 62 Fed. 539. The same disposition was made of the several demurrers as was made in the Frishmuth Case, except as to the second, which alleged a defect of parties complainant,—a defect which did not exist in the Antelo bill. The complainants thereupon amended, not by changing the original bill, but adding to it averments which were, in substance, those of the amendment in the Frishmuth suit, and that the fraud was concealed until within six years before suit was brought; the object being to bring the case within the rule of the United States courts that, where an action is brought in equity to recover on the ground of actual concealed fraud, "time will not begin to run in favor of the defendant until the discovery of the fraud, or until with reasonable diligence it might have been discovered." Kirby v. Railroad Co., 120 U. S. 130, 7 Sup. Ct. 430, 30 L. Ed. 569. If, as in the Frishmuth Case, the appellant had wished to challenge the correctness of the decree which dismissed the original bill, he should have appealed from that decree. U. S. v. Boyd, supra. The questions of importance which are before the court upon this appeal are whether the grounds of demurrer have been removed by the amendment; that is, whether the cause of action, as now stated by the bill as amended, is one for fraud, or, as before, for a breach of duty, and, if for fraud, what are the consequences. Is it a good bill, or is it multifarious (the defendant having made multifariousness an additional ground of demurrer), or was the injury remediable only by an action at law? The fundamental question is, what is the cause of action as stated in the bill? The appellant makes an additional point in regard to the form of the decree,—that it did not state, as it should have done, the causes of demurrer which were allowed and disallowed. The decree upon the original bill disallowed all the causes of demurrer, except those relating to the statute of limitations; and the opinion of the circuit judge upon the demurrers to the amended bill shows that, in his opinion, the question before him was upon the effect of the amendment. There is no practical difficulty in knowing which of the demurrers were sustained. The amendment consisted in characterizing the certification of the bonds as fraudulent, and adds to the previous averments of negligence the word "fraudulent." It is apparent, and

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it is conceded by the appellee, that the gravamen of the bill is still violation of duty, and that there was no intention to change the cause of action, which originally was for relief from the breach of trust by the trustee in certifying bonds which did not have the requisite security, and therefore were fraudulent in their nature. The original bill and the amendment contain a single set of facts, and the prayer of the bill as amended is for payment of the bonds, which have become worthless by the negligent conduct of the trustee. When the gravamen of the bill is for a breach of duty, and the action is thereby brought within the adverse effect of the influence of the statute of limitations, the addition of bare averments which call the same acts fraudulent do not convert it into a bill both for a fraud and a breach of duty or for fraud alone. The alleged acts constituted negligence, and it is useless to escape from the legal consequences of an action to recover damages for such acts by affixing to them the adjective "fraudulent." The bill is what it was originally, and the rider in regard to fraud has not altered its character.

The counsel for the complainant is of the opinion that sufficient attention was not paid by the circuit judge to the allegations of negligence on the part of the defendant in not defending in 1894 against the suit in Oregon for the forfeiture of the right of the railroad company to 850,000 acres of land, whereby a decree of court was entered which involved an alleged loss to the bondholders of $3,000,000. The circuit judge did not apparently hold that a recovery for the consequences of this alleged negligence was barred by lapse of time, but was of opinion that no sufficient acts of negligence were averred in the bill, for it does not appear that there was a defense, or that the right had not long before the commencement of the suit been lost. We think that the bill was and is deficient in that respect. The decrees of the circuit court in each suit are affirmed, with costs of this court.

(107 Fed. 179.)

NEW YORK LIFE INS. CO. v. ALLISON.

(Circuit Court of Appeals, Second Circuit. February 27, 1901.)

No. 80.

1. FEDERAL COURTS—FOLLOWING STATE DECISIONS—LAW OF FIXTURES.
   The federal courts adopt as the rule of decision as to fixtures the local law as established by the decisions of the courts of the state where the property is situated, when such decisions are explicit and uniform.[1]
2. FIXTURES—LAW OF NEW YORK.
   Under the decisions of the New York courts, a machine does not become a part of the realty by merely attaching it to a building, without the intention to make it a permanent accession, when it is not so incorporated with the building as to lose its identity or to render its removal injurious to the building, unless it is essential to the use to which the part of the building in which it is connected is appropriated.

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[1] State laws as rules of decision, see notes to Griffin v. Overman Wheel Co., 9 C. C. A. 548; Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.

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3. SAME—ELECTRIC LIGHTING MACHINERY.
Where a building was piped for lighting with gas, and also equipped with an electric lighting system, prepared for connection with the street supply, dynamos and engines for driving the same, installed in the building from considerations of economy only, and not from necessity, which were used for no other purpose than to supply electricity for use in the building, and which could be removed without difficulty or injury to themselves or the building, and were susceptible of use either singly or together in any other building, did not become a part of the realty, so as to pass under a prior mortgage, as against a purchaser of such machinery from the mortgagor.

4. SAME—SWITCH BOARDS, CHANDELIERS, AND SIGNS.
Electric lighting fixtures used in and about a theater building, and detachable without injury thereto, such as switch boards used to connect a dynamo with the permanent wiring of the building, chandeliers, and an electric sign, all of which are capable of being used elsewhere, are not a part of the realty, but chattels, under the law of New York.

5. SAME—THEATER CHAIRS.
Upholstered turn-over theater chairs, arranged in an auditorium in rows, in the usual manner of seating such rooms, and fastened to the floor by screws, being essential to the use for which the room is designed, are presumably intended as permanent attachments to the building, and are a part of the realty, as between mortgagor and mortgagee, unless circumstances indicating a contrary intention are shown.

6. SAME—STAGE SCENERY.
Stage scenery used in a theater, consisting of loose articles which can as well be used in another theater, is personal property.

7. SAME—WALL MIRRORS.
Large mirrors placed around the walls of a room used for public purposes when the building was constructed, forming panels finished in harmony with the remainder of the room, and which cannot be removed without leaving the room dismantled and unfinished in appearance, are a part of the building.

8. SAME—PUMPING ENGINES.
Whether pumping engines used in a theater building to pump water into tanks on the top of the building, and to keep filled the standpipes required by the law of the state to be maintained in such buildings, where they are removable without injury to the building, are a part of building, and realty as between mortgagor and mortgagee, is a question of fact, depending to some extent upon whether or not they are essential to the proper equipment of the building, and not alone upon the intention of the owner. Where they are only a matter of convenience, and the building contains other pumps which can be used for the same purposes, effect may be given to the intention of the owner that they should remain personal property, but otherwise they are not removable from the building.

9. CONVERSION—TRIAL—FURNISHING JURY WITH LIST OF PROPERTY.
In a suit for conversion, to recover the value of a large number of articles claimed as personal property by plaintiff, it is proper for the court to submit to the jury a schedule of the articles in controversy, to aid them in fixing the value of the property, provided such schedule conforms to the evidence.

In Error to the Circuit Court of the United States for the Southern District of New York.

Edward E. McCall, for plaintiff in error.
A. J. Dittenhoefer, for defendant in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The plaintiff in error was the defendant in the court below, and brings this writ of error to review a

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judgment for the plaintiff entered upon the verdict of a jury in an action brought to recover for the conversion of personal property. 101 Fed. 1007.

One Hammerstein on the 20th day of April, 1896, executed to the defendant a mortgage upon certain real estate situate in the city of New York, which included the building known as the "Olympia Theater." Default having been made in the payment of the mortgage debt, a foreclosure action was brought, and upon a decree rendered in that action the defendant purchased and became the owner of the mortgaged premises. After the execution of the mortgage, and before the decree of foreclosure, the mortgagor executed a bill of sale to one Lissner of all the goods, chattels, and fixtures within the theater building, described in a schedule annexed to the instrument; and thereafter Lissner, by a bill of sale, transferred the personal property in controversy to the plaintiff.

The principal issues litigated upon the trial were as to the title and value of the property; the defendant contending that most of the articles were fixtures, and passed as part of the realty by the purchase under the foreclosure decree. The jury, under the instructions of the court, rendered a special verdict specifying the particular articles which they found to be chattels as distinguished from fixtures, their respective values, and the aggregate value. As to some of these articles they were instructed by the court to find in favor of the plaintiff. As to others the question whether the articles were fixtures was left to them as one of fact, under general instructions as to the law applicable to the evidence. These instructions of the trial judge are impugned by the assignments of error.

A general statement of the facts as disclosed by the evidence, and the rules of law applicable, should preface a consideration of the assignments of error. It appeared upon the trial that the theater building had been fully equipped by Hammerstein prior to the date of the mortgage. It was subdivided into four places of amusement, —the music hall in the northern half of the first floor, the theater proper in the southern part of the first floor, the concert hall in the center, and the roof garden over all. The building was lighted by its own electric plant, being lighted throughout, and provided with chandeliers wherever needed, including the electrolier, 35 feet in length, and having a spread of about 20 feet, suspended in the concert hall. The electric current was supplied by dynamos located in the basement, driven by steam engines. The building was also piped and prepared for being lighted by gas. It was heated by steam, both the direct and the indirect systems being used. Electric signs were fastened to the outside of the building, equipped with letters for use to advertise the name of the theater and the plays being presented. As the city water could not rise to the top of the building, two large tanks were constructed there, supplying standpipes with water for protection against fire, and for supplying pipes leading to the stages for the production of water effects. The tanks were supplied with water by two pumping engines connected with boilers in the basement,—one under the stage of the music hall, and the other under the stage of the theater. The music hall was provided with

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ventilating fans for cooling purposes, and there was a ventilating fan in the basement, all actuated by electricity. The concert hall was fitted up with 10 large mirrors, the walls of the room being nearly covered by them. Throughout the building there were chairs and seats for the accommodation of the audiences. The stages were supplied with scenery, draperies, movable platforms, and stage properties.

In determining what annexations to real property, of chattels, constitute a part of the realty, the federal courts ascertain the local law of real property by the decisions of the courts of the states in which the property is situated, and, when these decisions are explicit and uniform, adopt them as the rule of decision. Davis v. Mason, 1 Pet. 503, 7 L. Ed. 239; Hinde v. Vaitter, 5 Pet. 398, 8 L. Ed. 168; Suydam v. Williamson, 24 How. 427, 16 L. Ed. 732; Williams v. Kirtland, 13 Wall. 306, 20 L. Ed. 683. The general rule derived from the decisions of the courts of New York is that unless the annexation is one of a permanent character, so that the machine or other chattel cannot be removed without substantial injury to the freehold, or unless the annexation is of a machine or chattel especially adapted for use in the particular place where it has been put, the purpose of the annexation and the intention with which it has been made are the most important considerations, and are the determining criterion, whether it is a fixture or a chattel. In McRae v. Bank, 66 N. Y. 489, the court of appeals used this language:

"If the article is attached for temporary use, with the intention of removing it, a mortgagee cannot interfere with its removal by the mortgagor. If it is placed there for the permanent improvement of the freehold, he may. The mode of annexation may, it is true, in the absence of any proof of intention, be controlling. It may be in itself so inseparable and permanent as to render the article necessarily a part of the realty, and, in case of less permanent mode of attachment, may afford convincing evidence that the intention was that the attachment should be permanent; as, for instance, where the building is constructed expressly to receive the machine or other article, and it could not be removed without material injury to the building, or the article would be of no value except for use in that particular building, or could not be removed therefrom without being destroyed or greatly damaged." "These are the tests which have been frequently applied in determining whether the annexation was intended to be temporary or permanent, but they are not the only ones. Nor is it indispensable that any of these conditions should exist."

After reviewing some of the leading cases which discuss the criterion of a fixture, the court said:

"The object, and not the method of the attachment, appears to be the controlling factor."

The decisions of the New York courts are in harmony with the general trend of the adjudications elsewhere, and are to the effect that a machine does not become a fixture by merely attaching it to a building, without the intention to make it a permanent accession, when it is not so incorporated with the building as to lose its identity, or render it difficult or injurious to the building to remove it, or when it is not essential to the use to which the part of the building in which it is connected is appropriated. Murdock v. Gifford, 18 N. Y. 28; Potter v. Cromwell, 40 N. Y. 287. The annexation is

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treated as of a permanent nature when the building is to be devoted to the purposes for which the machinery is to be used, and is not complete in the absence of the machinery.

Error is assigned of the instructions of the trial judge in respect to the dynamos and engines, their belts and connections. The jury found that the plaintiff was entitled to recover the value of "four dynamos," $5,510; "wiring from the dynamos to the main switch board in the cellar," $380; "two engines in cellar," $5,700; "engine belts," $380; "connections, consisting of pipes, valves, drip pans, etc.," $570. The dynamos were used solely for producing the electricity used in lighting and ventilating the building. They were connected to the engines by belts, and with the wiring of the building by wires running to the cellar switch board. They weighed about one ton each, rested on iron rails having wooden slips, and were bolted to the rails. The rails rested on a foundation of masonry. The engines to which the dynamos were connected rested on slabs of granite supported by a foundation of masonry, and were bolted to the slabs. The dynamos and engines were removable by unfastening the nuts of the bolts. There was a conflict of evidence as to whether the engines were used solely to run the dynamos, some evidence being given tending to show that they were also used to furnish exhaust steam for the heating system. It was proved that the building was originally wired for obtaining the electricity from one of the lighting companies whose wires were in the adjoining street; that electricity was obtained from this source for a time, but for economic reasons the street supply was discontinued and the dynamos and engines were substituted. The trial judge instructed the jury, in substance, that the dynamos and their connections were chattels, not fixtures, and that the engines and their connections were chattels, not fixtures, unless they found that they were to some extent a part of the heating system of the building, and if they so found they were fixtures.

The dynamos and engines were not especially adapted for use in this particular building, were susceptible of use either singly or jointly with their connections in any other building or place where such machines are operative, and could be removed without difficulty and without any injury to the building or themselves. The circumstances that the building was prepared to be lighted with gas, that its electric lighting system was prepared for connection with the street supply, and that the dynamos and engines were introduced into the building upon considerations of temporary economy, and not of necessity, are quite controlling. We are satisfied that in his instructions to the jury in regard to the dynamos, the engines, and their connections, the trial judge committed no error of which the defendant had a right to complain.

Error is also assigned of the instructions of the trial judge in regard to the chandeliers (including the dome chandelier or electrolier) and switch boards and electric signs. The jury found that the plaintiff was entitled to recover for the value of "chandeliers, gas and electric fixtures," $9,025; "four brass gas and electric chandeliers bought at Hotel Logerot," $1,425; "wiring and fitting fixtures bought at Hotel Logerot," $285; "four switchboards,—one large one in the

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cellar, and three small ones in upper part of building,"—$760; "three electric signs outside of theater," $285. The trial judge instructed the jury that all these articles were chattels, not fixtures. There was no disputed question of fact in respect to the character of these articles. The electric fans were screwed to the woodwork. The switch boards were removable without injuring the building or interfering with the part of the wiring system incorporated into the walls. Their only office was to connect the dynamos with the wiring system. The chandeliers were combination gas and electric lighting fixtures, detachable in the usual manner of electric lighting or gas fixtures. In McKeage v. Insurance Co., 81 N. Y. 38, the court of appeals said:

"Gas pipes which run through the walls and under the floors of the house are permanent parts of the building, but the fixtures attached to these pipes are not. They are not permanently annexed, but simply screwed to projections of the pipes from the walls left for that purpose, and can be detached by simply unscrewing them. * * * All these articles were, in their nature, mere furniture, and therefore chattels, and not appurtenances to the building. * * * They no more constituted a part of the latter than would pictures supported by fastenings driven into the wall."

See, also, Shaw v. Lenke, 1 Daly, 487; Lawrence v. Kemp, 1 Duer, 363; Walker v. Sherman, 20 Wend. 645; Manning v. Ogden, 70 Hun, 399, 24 N. Y. Supp. 70.

By analogy, while the wiring of an electric lighting system would be a part of the realty, the chandeliers and their appurtenances not permanently affixed to the building would be chattels, and not realty. On the same principle the other contrivances constituting a part of the lighting apparatus, not specially adapted to the particular building, but susceptible of use elsewhere as well, and readily detachable, would not be fixtures. The fact that the electrolier was a chandelier of exceptionally large dimensions is immaterial. The electric signs were no more a part of the building than are ordinary signs when not affixed as permanencies. If the letters with which they were supplied had been merely capable of advertising the name of the particular theater, a different conclusion would be reached. We conclude that the instructions of the trial judge were correct, and that these assignments of error were not well taken.

Error is also assigned of the instructions of the trial judge in regard to the chairs and benches. The jury found that the plaintiff was entitled to recover for the value of "1,499 chairs in music hall and theater," $2,137.50; "400 benches in the roof garden," $475. The evidence upon the trial was that the chairs were not made especially for the building, but were bought, already made, of a manufacturer of furniture. Some of them were used in the offices, some in the dressing rooms, some in the concert hall and roof garden, and some in the auditorium of the theater. Except the auditorium chairs, all the chairs and benches were loose. The auditorium chairs were turn-over chairs, upholstered in plush, and of the mechanical construction adapting them to be placed in rows and secured to the floor. They were placed over the carpets in rows, and fastened to the floor by screws. The evidence indicated that there were from 600 to 1,000 of these chairs, and the jury found their average value at $1.44 each. The trial judge left to the jury the question whether

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these auditorium chairs were fixtures, under instructions that were, in substance, that if they were so attached as to become part of the realty, and to indicate an intention that they were to remain permanently, they were fixtures; otherwise, they were not. It would seem that chairs attached and arranged substantially as these were are essential to the uses to which an auditorium is appropriated. We think he should have instructed them that, attached as they were, if they were, as to size, upholstering, mechanical construction, and general arrangement, adapted to conform to the auditorium, that fact would indicate an intention that they were to be regarded as fixtures. Grosz v. Jackson, 6 Daly, 463. In Concert Co. v. Sperry, 9 N. Y. St. Rep. 342, affirmed in 120 N. Y. 620, 23 N. E. 1152, where the chairs of a theater were secured to the floor by screws, the question whether they were fixtures arose between lessor and lessee under a provision of the lease that at the end of the term "all additions, alterations, and improvements on the premises should remain a part thereof and be surrendered to the lessor"; and the court held that the provisions of the lease did not change the character of the chairs from personalty to realty. In this case, however, it appeared that the lessee purchased the chairs under an agreement with the vendor by which the latter was to have a chattel mortgage upon them for the purchase price, and the chattel mortgage was executed to the vendor shortly after the chairs were placed in the theater. No other New York adjudications applicable to the case have been cited. In Andrews v. Chandler, 27 Ill. App. 103, it was held that theater chairs fastened to the floor of an opera house were personal property, and not covered by a mortgage of the real estate; but the decision was placed upon the ground that when the chairs were purchased the mortgagor made an agreement with the vendor to secure the purchase price by a chattel mortgage upon them, and that he would insure them, "loss, if any, payable to" the vendor.

The evidence in regard to the particular adaptation of the chairs to the auditorium was quite meager. If they were arranged as they generally are in such rooms, occupying the whole area of the auditorium when divided into the necessary aisles, we think, in view of the other evidence, that it should have been ruled, as matter of law, that they were fixtures. An auditorium without seating capacity would be incomplete, and the chairs as generally arranged and constructed in such a room are essential to the use to which that part of the building is appropriated. The exception by the defendant to the instructions of the judge in respect to the auditorium chairs was a general one, and the request for further instructions could not have been properly granted, following the phraseology in which they were made; and it is doubtful whether the exceptions are sufficient as the basis of assignments of error.

Error is assigned of the instructions of the trial judge to the jury in respect to the stage scenery. He instructed them that inasmuch as this consisted of loose articles, made to be hung up and taken down, all the articles were personalty. There was no evidence that the scenery and these other articles were not as susceptible of use in any other theater as in this one. They were merely furniture, just

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as the pictures hung upon the walls and used in representing in a play a furnished room would be furniture and not fixtures.

Error is also assigned of the instructions of the trial judge to the jury in respect to the mirrors. The jury found that the plaintiff was entitled to recover for "10 beveled mirrors in concert hall," $902.50. The trial judge instructed the jury, in substance, that the question in respect to these mirrors was whether they were set up in front of the walls, or as a part of the walls; that, if they were put there as intended to be a part of the walls, they would be real estate; on the contrary, if they were set up by the walls in front of them, although they were finished off to correspond with the room, they would be personal property; and, if they could be taken away without disturbing the wall, it was immaterial that the wall might be thereby left unfinished in appearance. To these instructions the defendant excepted. The proof was that the mirrors were put in during the construction of the building. They encircled the room in panels, and formed practically a mirrored room. Wooden strips forming panel frames were imbedded in the plastering of the walls. The strips were covered with an ornamented papier-maché molding, except at their inner edges. The frames of the mirror were decorated similarly to the molding on the strips. The mirrors were placed on and screwed into the uncovered edges of the underlying strips, and moldings ornamented like those on the strips and on the mirror frames were fastened over the outside edges of the frames. Thus the whole constituted a decorated panel ornamented by designs corresponding with the decorations throughout the room. The evidence left it in doubt whether there was any plaster within the space inclosed by the wooden strips. Hammerstein testified that when he put the mirrors in he expected to occupy the building permanently, and intended them to be a permanent part of the building so long as he should occupy it. Unlike ordinary mirrors supported by hooks or equivalent fastenings driven into the walls, and which can be detached from such supports without disturbing the walls, these mirrors were so attached as to become practically integral with the walls. They were intended to be, and were in fact, a part of the decoration of the room, necessary to complete the design and architectural finish of the room. They were put into the room with the intention that they should be a permanent accession. They could not be removed without leaving the whole room dismantled and unfinished in appearance. We are satisfied that they were fixtures, and that the evidence was so persuasive as to leave no question of fact for the jury. Cahn v. Hewsey (Super. N. Y.) 29 N. Y. Supp. 1107; Rogers v. Crow, 40 Mo. 91; Connor v. Squiers, 50 Vt. 680. The assignments of error founded upon the exceptions to the instructions of the trial judge are well taken.

Error is also assigned of the instructions of the trial judge in respect to the pumping engines. The jury found that the plaintiff was entitled to recover for "two pumping engines under the stage," $475; "connections for pumping engines," $95. These engines were located, one underneath the stage of the music hall, and one underneath the stage of the theater. They had no connection with the boiler pumps,

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or with pumping water from the cellar, or with running the elevators, all this having been done by pumps which were not in controversy; but they were used for the purpose of pumping water (presumably obtained from the street supply) into the tanks located on top of the building, and to fill the standpipes, in order that there would be a water supply for three uses,—in case of fire, for extinguishing the fire; for stage performances that required a water effect; and for spraying the building for cooling and cleaning purposes. They were attached to the floor or foundation of the building by bolts, and were detachable by unfastening the nuts. Hammerstein testified that it was not his intention that these pumps should become a permanent part of the building, that the other pumps would have supplied everything needed, and that these were additional pumps put in merely for convenience. The trial judge instructed the jury that these pumps and their connections were personalty, and the defendant excepted. We think this instruction was erroneous. There was a question of fact whether the other pumps would have supplied everything needed, and whether these were merely convenient accessories. The other pumps were connected with the heating system of the building. Presumably they were indispensable to that system, and no facts were shown to indicate how they could have been used in lieu of the pumping engines in controversy. The testimony of the mortgagor as to his personal intention, however competent and persuasive it may be, is not conclusive, when the question is whether machinery attached to and connected with the building is a fixture, when the machinery is essential for the purposes for which the building is to be used, and when the building would be incomplete without it. This machinery, or similar machinery, was indispensable to the use of the water tanks and standpipes, and these parts of the system were indispensable to the ordinary uses of the building as a theater, and without them the theater would not have been equipped according to law. The consolidation act (section 500) enacts that every theater "shall provide stand pipes which shall be kept constantly filled with water by means of an automatic pump or pumps." We think the trial judge should have submitted the question to the jury, with instructions giving due effect to the intentions of the mortgagor if they believed the testimony of Hammerstein.

Error is also assigned of the ruling of the court in submitting to the jury the list of articles or schedule on which they were instructed to base their verdict. The articles in controversy were so numerous that, without the schedule to refer to, it would have been impracticable for the jury to render an intelligent verdict. The course adopted by the trial judge in having a schedule prepared for and left with the jury, and in directing them to find specifically as to each article and as to its value, was judicious. But the schedule left with the jury was one prepared by one of the witnesses, and in one respect, at least, did not conform to the evidence. According to the evidence, the whole number of chairs and of roof-garden benches was 1,499. In the schedule submitted to the jury there were stated to be 1,499 chairs and 400 roof-garden benches. The jury found that the plaintiff was entitled to recover for the value of the roof-garden benches

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$475, as well as for 1,499 chairs. The objection made by the defendant to submitting the schedule to the jury was a general objection, and the inaccuracy of the schedule was not suggested. While it is evident that the jury was misled by the use of this schedule into a recovery against the defendant for $475 more than the plaintiff was entitled to, the assignment of error is not well taken, because the objection and exception upon the trial was not sufficiently specific.

We have thus considered all the assignments of error which are discussed in the brief of counsel for the plaintiff in error. It has seemed proper to do this for the information of the court below in the event of another trial, notwithstanding our conclusion that the validity of some of the assignments of error must lead to a reversal of the judgment.

If the judgment should be reduced to the extent of the recovery for the mirrors, the pumping engines and their connections, the roof-garden benches, and 1,000 auditorium chairs, the rights of the defendant, upon the evidence, would be fully protected. If the defendant in error stipulates to reduce the judgment accordingly, the judgment will be modified, and as modified affirmed, but with costs of this court against the defendant in error; otherwise, the judgment will be reversed, with costs.

Ordered accordingly.

(107 Fed. 196.)

BRADLEY v. ANDRUS.

(Circuit Court of Appeals, Third Circuit. March 28, 1901.)

No. 30.

INDORSEMENT OF CHECK—BONA FIDE PURCHASER—PRESENTMENT—UNREASONABLE DELAY—DRAWER'S LIABILITY.

Several weeks after a check was drawn and indorsed by the payee to an innocent purchaser for value, the drawer, in reliance on the payee's fraudulent representation that he had lost or mislaid it, and on his agreement to return it, overpaid the latter the full amount thereof on a settlement between them, though he would not have done so if the holder had promptly presented the check for payment. *Held*, that he was liable thereon notwithstanding the holder's unreasonable delay, as the overpayment was due proximately to his imprudent reliance on the payee.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Andrew J. Maloney, for plaintiff in error.

Henry P. Brown, for defendant in error.

Before GRAY, Circuit Judge, and BRADFORD and J. B. McPHERSON, District Judges.

BRADFORD, District Judge. John E. Andrus, the defendant in error, brought an action of assumpsit in the court below against Thomas Bradley, the plaintiff in error, on a check dated February 18, 1897, drawn by Bradley on the Security Trust Company of Philadelphia to the order of Francis C. Grable for $12,500 and by Grable

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and Andrus indorsed in blank. The defendant having pleaded non assumpsit, payment and set-off, and given notice of special matter of defense, the case went to trial before a jury. At the close of the testimony the counsel for the respective parties stipulated in open court as follows:

"It is agreed by counsel in open court that a verdict shall be taken for the plaintiff for the sum of $14,845.81, it being understood and agreed between them that the case shall be placed upon the proper list for argument upon the question reserved as to whether the defence which has been set up and shown by evidence is a valid defence. If the court shall be of opinion that it is a valid defence, judgment to be entered for defendant notwithstanding the verdict. Otherwise judgment for plaintiff upon the verdict as rendered. The verdict is to be taken with interest from ———, amounting to ———, subject to the power of the court upon the argument hereafter to take place, to reduce the verdict by the amount of interest so included, if in the judgment of the court the interest should not have been made a part of the verdict."

Pursuant to this agreement and by direction of the court the jury returned a verdict for the plaintiff in the sum of $14,845.81; whereupon the defendant moved for a new trial and also for judgment non obstante veredicto. Both motions were denied, but the court corrected an improper inclusion of interest in the verdict by reducing the latter to $14,139.56, for which amount judgment was rendered. (C. C.) 102 Fed. 54. The plaintiff in error relies on the third assignment, which is "that the learned judge erred in denying defendant's motion for judgment non obstante veredicto." The purpose of the above stipulation of counsel was to submit the evidence as well as the law in the case to the decision of the court. The learned circuit judge accordingly found the facts as follows:

"The defendant, Thomas Bradley, on February 18, 1897, gave to one Francis C. Grable a check for $12,500 on the Security Trust Company of Philadelphia. Two or three weeks afterwards, when the bank book of Bradley was settled, he found that the check had not been presented for payment. He thereupon made inquiry of Grable, and was told by him that it was still in his possession, and that he would return it. On April 15, 1897, Bradley and Grable had a general settlement, and it then appeared that Bradley owed Grable $19,416.67. In this last mentioned amount, however, there was included the sum of $12,500 for which Bradley's check of February 18, 1897, had been given. At this settlement Bradley was told by Grable that he had lost or mislaid that check and that he would look for it, and if found return it. In addition to this oral assurance Grable gave to Bradley a statement in writing as follows:

"'Philadelphia, April 15, 1897.

"'I have in my possession check No. 1553, drawn on the Security Trust and Life Insurance Company, dated February 18, 1897, for twelve thousand five hundred dollars, drawn to my order and signed by Thomas Bradley, which I am to return to Mr. Bradley as settlement has been made, and it will not be presented for payment. Francis C. Grable.

"'Witness: E. I. P. Grubb.'

"Relying on this statement Bradley paid Grable the full amount of $19,416.67, instead of only $6,916.67, which latter was the true amount due by Bradley to Grable, and the only amount which would have been paid if it had been known by Bradley that his check of February 18, 1897, was then outstanding, as presently to be stated. Subsequently, on October 20, 1897, Bradley gave notice to the Security Trust Company not to pay the check, and when it was thereafter presented, as will presently be mentioned, the Trust Company, in obedience to that notice, refused payment, and the check

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was protested. The statements made by Grable to Bradley were false and fraudulent. The fact is that Grable had passed the check to John E. Andrus, the plaintiff in this case, upon the day after he (Grable) had obtained it from Bradley. Andrus had no knowledge of any fraud or contemplated fraud on the part of Grable, but took the check innocently and gave cash for it to the amount of its full face value. At Grable's request, Andrus held the check instead of presenting it, but subsequently passed it to one William J. Arkell for certain stocks or bonds. And Arkell, in January, 1898, presented it for payment, which, as has been stated, was refused. Arkell thereupon brought suit upon it, but that suit was discontinued, the check was returned to Andrus, and this present action instituted."

No assignment of error questions the authority of the court below to find the facts pursuant to the above stipulation of counsel or the regularity of such procedure, nor has any such question been suggested by counsel on either side. We must, therefore, give to the finding by the court below conclusive effect in this court as to the facts so found. That finding expressly negatives fraud on the part of Andrus, the learned judge saying: "Andrus had no knowledge of any fraud or contemplated fraud on the part of Grable, but took the check innocently and gave cash for it to the amount of its full face value." Andrus in holding the check from February 19, 1897, until the latter part of January, 1898, without presenting it for payment, certainly was not diligent in the assertion of his rights. He omitted seeking payment for an unreasonable time. But mere delay for eleven months, though unreasonable, in presenting the check for payment at the bank on which it was drawn, could not of itself defeat in whole or in part the right of Andrus, as its bona fide holder, to recover from the drawer, unless funds of the latter applicable to the check were in the interim lost through the insolvency or failure of the bank. It is admitted, however, that the bank was solvent during all that period, and thereafter continued so, and, further, that the check when presented would have been promptly paid by the bank had it not been for the notice given by Bradley to the bank October 20, 1897, not to pay it. If Bradley has any defence to the action it must rest on some other ground than the mere omission by Andrus to present the check for payment within a reasonable time after he received it. Undoubtedly, if Andrus on receiving the check had promptly presented it at bank, Bradley would not have paid its amount to Grable in the settlement of April 15, 1897. But while the delay on the part of Andrus to present the check prior to such settlement was the condition, it was not the proximate cause, of such over-payment by Bradley to Grable. Bradley was induced to make such payment, not by the fact that the check had not been presented, but through his imprudent reliance on the false and fraudulent representation made to him by Grable that the check, though mislaid, was still in his possession and that he would return it. He could have insisted on full indemnity from Grable before including the amount of the check in the settlement or have refused, in the absence of the check, to pay its amount. Had he secured such indemnity he would have been saved from the loss with which he is now visited. Or had he refused to pay, any judgment which might have been recovered against him for the amount of the check would have been within the control of the court rendering it, and execution could have been re-

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strained until proper indemnity was given against any claim by a bona fide holder for value. But he did not demand indemnity nor exercise any reasonable precaution. He wholly relied on the word of Grable, and in making payment to him of the amount of the check he must be held to have assumed the risk of his falsity. Bradley cannot successfully invoke the doctrine of estoppel. It is an elementary principle of the law of estoppel that he who claims the benfit of an equitable estoppel or estoppel in pais on the ground that he has been misled through the acts, conduct or representations of another, must not have been misled through his own want of reasonable care and circumspection. Had Bradley observed the caution to be expected from an ordinarily prudent man in similar circumstances he would have required something more than the mere assurance of Grable before paying to him the amount of the check. Even if the other essential elements of an estoppel in pais were present the lack of reasonable care on the part of Bradley would negative the existence of an estoppel. We think that the doctrine of estoppel is wholly inapplicable to the case. Andrus might have suffered loss by failure of the bank before presentation of the check, but he did not owe any legal duty to Bradley to present it. Bradley through his improvidence made the over-payment, and while great hardship has resulted to him from the fraud of Grable in connection with his own want of circumspection, yet as between Andrus and Bradley the latter must be treated as the author of his own misfortune. We perceive no ground on which the motion for judgment non obstante veredicto could have been granted.

The judgment below is affirmed.

(107 Fed. 215.)

THIRD AVE. R. CO. v. BARTON.

(Circuit Court of Appeals, Second Circuit. January 4, 1901.)

No. 35.

CARRIERS—INJURY TO PASSENGER ON STREET CAR—CONTRIBUTORY NEGLIGENCE.

Plaintiff mounted the running board on the side of a street car, and while the car was in motion the conductor called to him to come forward to a vacant seat. In passing forward on the running board, he met the conductor, and in attempting to pass around him on the outside struck against a pillar standing near the track, and was injured. *Held*, that the fact that plaintiff was acting in obedience to the invitation or direction of the conductor, or that the conductor obstructed his passage, did not absolve him from the duty of exercising reasonable prudence and care for his own safety, and that, to entitle him to recover for the injury, it must appear from all the circumstances shown that in attempting to pass the conductor he acted with ordinary prudence.

In Error to the Circuit Court of the United States for the Southern District of New York.

H. R. Limburger, for plaintiff in error.

George R. Baker, for defendant in error.

Before WALLACE and LACOMBE, Circuit Judges.

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LACOMBE, Circuit Judge. The action was brought to recover damages for personal injuries sustained by the plaintiff, and claimed to have been occasioned by the negligence of the defendant. Plaintiff, while a passenger on one of defendant's cars, which run beneath the elevated railroad structure on Third avenue, was brought into violent contact with one of the pillars of such structure, which was located with its base 3 feet 2½ inches from the nearest rail of defendant's track. On the open cars of defendant there are uprights marking the different compartments or seats, to which are attached metal stanchions for handholds. The distance between these stanchions and the pillar is a trifle less than two feet. Access to the different seats is afforded by a side step or running board extending along the side of the car from front to rear. In view of the verdict of the jury, the plaintiff's version of the occurrence must be accepted. He boarded the car somewhere near Fifteenth street, getting on the step somewhat back of the middle of the car, with a stanchion in each hand. The car started, and the conductor motioned him to come forward, calling out: "Seat in front, sir. Come forward here, and get the seat." The plaintiff moved forward along the step to get the seat. At the same time the conductor was moving towards the rear along the same step. When they reached each other, the conductor "obstructed his way," and plaintiff was "passing the conductor at the time that he struck the post." The conductor "stood there" on the step, and by so standing "forced plaintiff around him," but did "not catch hold of plaintiff with his hand, or anything of that sort." Plaintiff "started to go around the conductor," and while in that situation his head came in contact with the pillar. The conductor did not go inside the car when plaintiff was about to pass. He passed plaintiff on the inside. Plaintiff had ridden on the road before, and knew of the elevated pillars that are located there in a general way.

Defendant assigns error that the jury was not sufficiently instructed by the charge as to the law of contributory negligence. After a brief statement as to the degree of care required from common carriers of passengers, the court charged as follows:

"There is no question that the plaintiff suffered on the morning of October 2, 1897, a very serious injury. Neither is there any question but that he received the injury by coming in contact with a pillar of the elevated railroad. There is no adequate question that if he received the injury by walking along the step, going behind the conductor in response to his demand or call, and if the conductor, by his command, placed the plaintiff in the condition or status of danger in consequence of which he received the injury, the defendant is liable; that is, if the conductor told him to place himself in a position in which the plaintiff must necessarily come into a dangerous position, and in consequence of which he received the injury, the defendant is liable. Upon the other hand, if the plaintiff voluntarily, and without any reason except his own wish, left a position of safety, and placed himself in a position of danger, and there was no invitation or summons from the conductor, then the defendant is not liable. So that the question, as you see, is one entirely of fact. Which theory do you think has been proved to your satisfaction? The plaintiff must prove his case by a fair and reasonable preponderance of testimony. That does not mean by a superior number of witnesses, but by testimony which satisfies you of its correctness."

It is quite apparent from this quotation that the jury might fairly have inferred that, if the plaintiff were in a place of safety, and

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left it not voluntarily, or because of his own wish, but by reason of the invitation or summons of the conductor, in order to take a vacant seat, and while moving towards such vacant seat encountered the conductor, who insisted on standing in such a position that plaintiff could only proceed by undertaking a manifestly perilous passage, they must find for plaintiff. In order, however, to entitle the plaintiff to recover under such circumstances, it must be apparent upon the whole case that in undertaking such passage he acted as a man of ordinary prudence would have done. He was not physically thrust into peril. When he reached the conductor on the step, he might fairly have insisted that the latter should step inside, or should retreat sufficiently far to uncover the entrance to the vacant seat, or should allow plaintiff to pass inside of him. Certainly, plaintiff was under no obligation to proceed by passing on the outside of the conductor, and whether he acted with reasonable prudence in attempting to do so was a question which defendant was entitled to have submitted to the jury, but which, under the charge, was practically withdrawn from their consideration. Defendant excepted to that portion of the charge which instructed the jury that "there is no question but that, if he was called by the conductor, and placed in a position of danger, then the defendant is liable, and the plaintiff is entitled to recovery." And defendant specifically called the court's attention to its twenty-first and twenty-second requests to charge, and excepted to its refusal to charge them. They read as follows:

"(21) If you believe that the plaintiff, even though he were invited to do so by the conductor, committed a negligent act in passing around the conductor while on the step, then your verdict must be for the defendant. (22) An invitation by a conductor does not relieve a passenger from the rule that the passenger must use care of an ordinarily prudent man for his own safety."

We think it was error to refuse these requests. The judgment is reversed, and new trial ordered, with costs of this court to plaintiff in error.

(107 Fed. 219.)

FOERDERER v. TRADESMEN'S NAT. BANK OF NEW YORK.

(Circuit Court of Appeals, Second Circuit. February 27, 1901.)

No. 85.

FACTORS—SALE—VALIDITY—BONA FIDE PURCHASER—FACTOR'S ACT—CONVERSION.

J. & Co., factors in Pennsylvania, received a consignment of wool from another Pennsylvania factor, and made advances without notice that their consignor was not the actual owner. J. & Co. shipped the wool to Massachusetts, to purchasers; but, before delivery, defendant seized the same in replevin, and, being unsuccessful in the suit, defendant elected to hold the wool and pay its full value, with damages, under a stipulation with J. & Co.; whereupon plaintiff, the original owner, brought trover for its conversion. *Held*, that the stipulation amounted to a sale, which J. & Co.'s consignors had a right to make under Pennsylvania Factor's Act, § 3, declaring that, where a factor disposes of or pledges property in his possession as security for advances, the transferee acquires the title;

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and hence defendant acquired a good title to the wool from J. & Co., and plaintiff could not recover.

In Error to the Circuit Court of the United States for the Southern District of New York.

N. Dubois Miller, for plaintiff in error.
John J. Adams, for defendant in error.

Before WALLACE and LACOMBE, Circuit Judges.

WALLACE, Circuit Judge. Error is assigned of the ruling of the trial judge in directing a verdict for the defendant.

The action was in trover, brought to recover for the conversion of certain bales of wool; and the facts proved upon the trial, so far as they are material for present purposes, were these: The plaintiff made an agreement with the Keen-Sutterle Company, a corporation doing business as commission merchants at Philadelphia, by which the corporation was to import and sell wool on his account for a stated commission; the wool to be bought abroad upón a credit to be provided at London by the plaintiff. The wool in controversy (277 bales) arrived at Philadelphia in September, 1895, and was delivered into the possession of the Keen-Sutterle Company; the bills of lading and invoices for the same having been indorsed to that corporation. Shortly afterwards the Keen-Sutterle Company consigned the wool for sale to Jagode & Co., commission merchants doing business at Philadelphia; the latter making advances to the Keen-Sutterle Company on the wool at the time it was delivered into their possession for about 75 or 80 per cent. of its value. In taking the consignment and making the advances, Jagode & Co. acted in good faith, and without any notice, by document or otherwise, that the Keen-Sutterle Company was not the real owner of the wool. Subsequently the Keen-Sutterle Company failed, and thereafter Jagode & Co. sold the wool and shipped it to purchasers in Massachusetts. While the wool was in transit it was seized by a writ of replevin in an action brought by the defendant, the Tradesmen's National Bank of New York; the latter claiming title thereto under certain warehouse receipts. Jagode & Co. interposed an answer in the action setting up their title, but before the action came to trial the bank ascertained that its receipts did not cover the bales in controversy, and thereupon entered into a stipulation with Jagode & Co. that judgment be entered in the action for the return of the goods described in the writ of replevin, and in lieu thereof for the payment to Jagode & Co. of the value of the wool, with damages for detention. Judgment was accordingly entered to that effect by the court. The Tradesmen's National Bank elected to retain the wool, and paid to Jagode & Co. the sum of $25,105,—the stipulated value and damages. Thereafter the bank sold the wool, and the present action was brought.

Were it not for the factor's act of the state of Pennsylvania, it would be entirely clear that neither Jagode & Co. nor the defendant could be protected under any title derived from the Keen-Sutterle Company. A factor is an agent for the owner of the goods

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consigned, and must observe the instructions of his principal in respect to them, whether express or implied, and cannot deal with the property as his own. In the absence of instructions to the contrary, he is empowered to sell the goods of his principal according to the usage of the trade. Upon a sale made by the factor conformably to his authority, the principal is devested of his title in the goods, and the title passes to the purchaser. He has a lien upon the goods while they are in his possession for his advances and commissions, and upon the proceeds of the sale. He has no authority to use or pledge them for his own benefit, except for the purpose of reimbursing himself when the principal, after reasonable notice and demand, fails to repay his advances. He cannot ordinarily bind his principal by a disposition of the goods not made in the usual course of business. Bank v. Heilbronner, 108 N. Y. 439, 15 N. E. 701; Easton v. Clark, 35 N. Y. 225; Romeo v. Martucci (Conn.) 45 Atl. 1. He must sell in the market where he transacts business. Catlin v. Bell, 4 Camp. 183; Marr v. Barrett, 41 Me. 403. He cannot sell by way of barter. Guerreiro v. Peile, 3 Barn. & Ald. 616–618; Biggs v. Evans [1894] 1 Q. B. Div. 88; Machine Co. v. Heller, 44 Wis. 265; Potter v. Dennison, 10 Ill. 590. If he makes an unauthorized disposition of the goods, his lien is lost; and such a disposition of them does not transfer any right as against the principal, even to the extent of the lien. McCombie v. Davies, 7 East, 5; Graham v. Dyster, 6 Maule & S. 1. As Chancellor Kent says:

"The principal is not even obliged to tender to the pawnee the balance due from the principal to the factor; for the lien which the factor might have had for such balance is personal, and cannot be transferred by his tortious act in pledging the goods for his own gain." 2 Kent, Comm. (12th Ed.) 626.

As persons dealing with an agent are bound to take notice of the extent of his powers, a transfer of property by a factor not authorized by the powers delegated to him by the principal creates no right in the person dealing with him, as against the principal. It follows that innocent purchasers or pledgees, who, relying upon the indicia of title afforded by his possession of the goods, have dealt with the factor, supposing him to be the actual owner, acquire no title to the property where the transfer is unauthorized by the express or implied terms of the principal's instructions. Applying these rules to the present case, inasmuch as the Keen-Sutterle Company, the factor of the plaintiff, transcended its authority in consigning the wool upon advances to Jagode & Co., the latter, except for the provisions of the factor's act, would have acquired no title to the property as against the real owner, the plaintiff; and, as Jagode & Co. could not transfer a better title than they had themselves, the defendant could not have acquired any title to the wool through Jagode & Co. as against the plaintiff.

The factor's act of Pennsylvania is designed to remedy the hardship of the common law whereby "factors authorized to sell the goods of their principal, and who are held out to the world as the owners thereof, have no power to pledge the goods in their possession for advances made by persons who have reason to believe that they are the actual owners." See Mackay v. Dillinger, 73 Pa.

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90. Unlike cognate legislation in some of the other states, the act does not purport to give validity to all contracts made by a factor in respect to the disposition of the goods with innocent third persons who advance money therefor, but it is limited to the protection of third persons who advance money or negotiable instruments upon a deposit or pledge of the goods by the factor. The third section of the act provides as follows:

"Whenever a consignee or factor, having possession of merchandise, with authority to sell the same, * * * shall dispose of or pledge such merchandise or any part thereof, with any person as a security for any money advanced or negotiable instrument given by him upon the faith thereof, such other person shall acquire by virtue of such contract the same interest in and authority over the said merchandise as he would have acquired thereby if such consignee or factor had been the actual owner thereof: provided, that such person shall not have notice by document or otherwise, before the time of such advance or receipt, that the holder of such merchandise or document is not the actual owner of such merchandise." P. L. 1833–34, p. 376.

This statute, being in derogation of the common law, is to be strictly construed. Shaw v. Railroad Co., 101 U. S. 557, 25 L. Ed. 892; Machine Co. v. Heller, supra; Bank v. Shaw, 61 N. Y. 283.

But, upon the most literal construction, the terms of the section protect a factor who has received from another factor a consignment of merchandise in the possession of the latter, and made advances thereon, without notice by document or otherwise that the consigning factor was not the actual owner. The factor thus receiving a consignment and making advances thereon acquires, by the explicit language of the section, the same "interest in and authority over" the merchandise as though the consigning factor were at the time its actual owner. Until his lien is satisfied he has the same right to sell or dispose of the merchandise that he would have had if it had been consigned to him by the actual owner, and any sale or transfer of it made by him conformably with a factor's duty to his principal will devest the title of the real owner. Unless he can sell the merchandise, his lien would be of no value, and the statute would be merely an illusory protection to him. The terms of the section apply to and control the transaction between the Keen-Sutterle Company and Jagode & Co. The Keen-Sutterle Company, being in possession of the wool, consigned it to Jagode & Co., and the latter made the advances without notice that the Keen-Sutterle Company was not the actual owner. Consequently Jagode & Co., by force of the statute, became entitled to deal with the wool exactly as though the Keen-Sutterle Company had been the owner, and had consigned it to them as its own factors.

We are of the opinion that the defendant acquired a valid title to the wool under the arrangement made by Jagode & Co. in the replevin suit. Jagode & Co. sold the wool, as factors, in the ordinary course of business, to a Massachusetts purchaser. If the goods had been delivered to this purchaser, the title of the Keen-Sutterle Company, and consequently the plaintiff's title, would have been completely devested. The sale, being authorized by the implied powers of Jagode & Co. as factors, would have passed the title of their con-

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signor as that of "the actual owner" of the wool; and thereafter all right of the plaintiff in the wool would have been gone, and in lieu thereof he would have been relegated to his claim upon Jagode & Co. for the price, less their advances to the Keen-Sutterle Company and their commissions. Before the wool was actually delivered to the purchaser it was taken from the possession of Jagode & Co., in Massachusetts, by the proceedings in the replevin action brought by the present defendant. The law authorized the bringing of such an action, and compelled Jagode & Co. to accept the bond given at the institution of the action in lieu of the possession of the goods. According to the rule which obtains in some jurisdictions, the bond becomes a substitute for the property, and the plaintiff in such an action acquires a title to the property in dispute, which he may dispose of before the decision of the cause. Stewart v. Wolf (Pa. Sup.) 7 Atl. 165; Fisher v. Whoollery, 25 Pa. 197. This rule does not obtain in Massachusetts. Lockwood v. Perry, 9 Metc. (Mass.) 440; White v. Dolliver, 113 Mass. 400. The judgment in such an action is conclusive between the parties, both as to the value and the ownership of the property, if the ownership is in issue. Leonard v. Whitney, 109 Mass. 267. When in such an action judgment is rendered for the defendant for the return of the property, or in the alternative a recovery of its value, the payment of the recovery by the defendant operates to transfer to him all the right and interest of the plaintiff in the property. Hunt v. Bennett, 4 G. Greene, 512; Pickett v. Bridges, 10 Humph. 171; Brinsmead v. Harrison, L. R. 6 C. P. 584; Thayer v. Manley, 73 N. Y. 305; Lovejoy v. Murray, 3 Wall. 1, 18 L. Ed. 129; Howard v. Smith, 12 Pick. 202; Holmes v. Wilson, 10 Adol. & E. 503. In defending the replevin action and consenting to the stipulation made therein, we do not doubt that Jagode & Co. were acting within the scope of their implied authority as factors. The goods, without fault on their part, had been transferred from the market where they were originally to be sold to another state. They had a large interest in them, growing out of their advances,—an interest larger than that of their consignor. The consignor had failed. To have brought the wool back to Philadelphia and resold it there would have entailed a considerable expense, and they had an opportunity to obtain from the defendant its full value where it was. Having made these large advances, they were clothed with the right to sell the wool, in the exercise of a sound discretion, not inconsistent with their duties to their principal. Under the circumstances, the arrangement made with the defendant, and which was, in substance, a sale of the wool, was one for the best interests of their consignor, and one, therefore, which they had a right to make. Their consignor being bound by the arrangement, the plaintiff has no remedy against the defendant, because, as between them and their consignor, the latter was, pursuant to the terms of the factor's act, the owner of the wool, and the defendant consequently acquired the owner's title by the purchase.

We conclude that the trial judge properly directed a verdict for the defendant, and that the judgment should be affirmed.

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(107 Fed. 223.)

METCALF v. MILLER.

(Circuit Court of Appeals, Ninth Circuit. February 4, 1901.)

No. 614.

NOTE—CONSIDERATION—ASSESSMENT ON STOCK OF INSURANCE COMPANY.

It being the duty of the insurance commissioner to make requisition for an assessment on the stockholders of an insurance company, to make up the deficiency where its capital has been impaired, and, if the deficiency is not made up, to notify the attorney general to commence action for dissolution of the company (Pol. Code Cal. §§ 600, 601), there is consideration for a note given by a stockholder to satisfy an assessment made pursuant to such a requisition, though the assessment is technically defective.

In Error to the Circuit Court of the United States for the District of Washington.

This is an action upon a promissory note given by the defendant in error to the plaintiff in error. The trial court directed a verdict for the defendant in error on the ground of want of consideration for the note. To reverse this ruling, the case has been brought to this court. The complainant states the diverse citizenship of the parties, and sets up the following note as having been given for a valuable consideration:

"$2,500.00. Oakland, California, Dec. 12th, 1893.

"On or before one year from date, without grace, for value received, I promise to pay to the order of Victor H. Metcalf, at his office, No. 969 Broadway, Oakland, California, the sum of twenty-five hundred ($2,500) dollars, payable in gold coin, and with interest thereon in like gold coin from date until paid at the rate of six per cent. per annum, payable semiannually.

"Mary M. Miller."

It is alleged that the plaintiff in error is still the holder and owner of said note, and that the defendant in error refuses to pay the same. The defendant in error, in her answer, denies that there was any consideration whatever for the said note, and as matter of affirmative defense alleges: That prior to the execution and delivery of said note she was the owner of 50 shares of the stock of the Oakland Home Insurance Company, a California corporation. That by misappropriation of funds for the payment of dividends the capital of said corporation was impaired, and on the 29th day of September, 1893, the insurance commissioner of California, under statutory authority, made a requisition on the company to make good within 60 days the impairment of the stock in the sum of $100,000 by assessment thereon. That on the same date the board of directors of said company, in pursuance of said requisition, passed the following resolution: "Resolved, that an assessment of $50 per share, amounting to $100,000, be, and is hereby, levied upon the capital stock of the Oakland Home Insurance Company, payable immediately, and stock upon which said assessment is not paid on November 15, 1893, shall be delinquent, and advertised for sale at public auction, and, unless payment is made before, will be sold on November 30, 1893, to pay delinquent assessment, together with costs of advertising and expenses of sale." That said resolution or order levying an assessment did not comply with the provisions and terms of section 334 of the Civil Code of California, in that it did not designate to whom and where said assessment was payable. The court below considered this a fatal defect, rendering the assessment illegal, and that there was, therefore, no consideration for the note. Plaintiff in error contends, however, that there was an inchoate liability imposed by the requisition of the insurance commissioner upon the stockholders, and the discharge of this liability would be a valid consideration for a note, without regard to the technical legality of the assessment levied by the board of directors. It is also contended that the evidence tends to show that the note was given in

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consideration of the advance by various persons of the amount of the assessment upon the stock of the defendant in error, which advance had been made with her full knowledge, and that she chose to avoid litigation, and to discharge this liability impending over her stock, by a promise to pay the money which had been so advanced; that at the request of the lenders, and with the knowledge of the defendant in error, the note was made payable to the order of the plaintiff in error, with the understanding that he was to hold the note, and collect the same, and pay the proceeds thereof to said lenders; that, as a trustee of such express trust, he is beneficially interested in said note. The defendant in error denies the interest of the plaintiff in error in said note, and with regard to the circumstances surrounding the execution of the note alleges that she was a nonresident of California, and unacquainted with the laws thereof; that she was informed by the board of directors of said insurance company that her stock in said company would be sold unless she would give her note for the amount of said assessment, payable to the order of the plaintiff in error; that, relying upon such representations, she executed and delivered the note in controversy; that said statements and representations were false, and were known to be false by said directors at the time they were made, and that said note was, therefore, wholly without consideration.

Charles E. Shepard (Will H. Thompson and George D. Metcalf, of counsel), for plaintiff in error.

E. F. Blaine and Wilmon Tucker, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge, after the foregoing statement of facts, delivered the opinion of the court.

The assignments of error comprise: (1) The admission of certain testimony of the defendant in error with regard to the reasons actuating the making of the note, and stating information received by her thereafter; and (2) the direction to the jury to return a verdict for the defendant in error.

As the principal inquiry is directed to the question of consideration for the note which is the basis of this action, and as the alleged want of consideration is based upon a charge of fraud, great latitude is to be allowed in the admission of evidence. The nature of fraud is such that it can seldom be established by direct or positive evidence. Generally, it must be inferred from the facts and circumstances attending the particular transaction. It is the rule, therefore, that a person who seeks to prove fraud in a sale or other transaction may show every circumstance in the condition or relation of the parties, and every act or declaration of the party charged with the fraud, which, in the opinion of the judge, bears such a relation to the transaction under investigation as to be in its nature calculated to persuade the jury that the charge of fraud is or is not well founded; and this evidence may include dealings both before and after the time of the transaction under investigation, if tending to establish the fraud charged. 14 Am. & Eng. Enc. Law (2d Ed.) 195, 196, and cases there cited. Parties engaging in a fraudulent transaction frequently pursue such devious courses to conceal their designs, and resort to such subtle practices to mislead their victims, that their schemes cannot be detected unless the door is swung wide open for the admission of all testimony having any possible bearing upon the question. Sonnentheil v. Brewing Co., 172 U. S. 401,

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410, 19 Sup. Ct. 233, 43 L. Ed. 492. The assignment of error with regard to the admission of testimony cannot, therefore, be sustained.

The main question for determination is, then, whether or not the trial court committed error in directing a verdict for the defendant in error upon the ground that the illegality of the assessment rendered the note void for want of consideration. Conceding that the resolution levying the assessment was imperfect in form, would such technical defect affect the validity of the note if the purpose of the assessment was a proper one, and the intention of the party executing the note was in accord with such purpose? In other words, was the consideration for the note dependent upon the form of the assessment? The state exercises a supervisory control over the business of insurance through the medium of an officer designated as "insurance commissioner," whose duty it is to issue to parties wishing to engage in the insurance business within this state, who may be found upon examination to be in the solvent condition provided by the insurance laws, certificates of authority to transact their business. Without such certificate, it is unlawful to transact such business. It is the further duty of the insurance commissioner to thoroughly inspect and examine the affairs of persons or companies engaged in such business, and, if found to be insolvent, to revoke the certificate granted, and require the capital of such person or corporation to be repaired by assessments upon the stockholders within such period as he may designate. If, upon such requisition, the deficiency of capital is not made up, the commissioner must communicate the fact to the attorney general of the state, whose duty it is to commence an action against such person or corporation for a decree of dissolution. Pol. Code Cal. §§ 600, 601. The law creates the liability of the stockholders in an insurance company for any deficiency in the capital stock of the corporation, and the requisition of the insurance commissioner fixes that liability, and sets in motion the proceedings necessary to make up the deficiency and restore the corporation to a solvent condition. When the insurance commissioner has made his requisition, the authority of the insurance company to incur further insurance liability is suspended, and the stock of the corporation is immediately charged with the burden of making the capital stock good. The levy of an assessment upon the stockholders is a part of the procedure for accomplishing that purpose, but, whether the assessment is formal or informal, regular or irregular, it neither creates nor discharges the liability of the stockholder for the deficiency. This legal responsibility has been determined by law prior to the assessment, and it only remains for the corporation, by means of an assessment, to levy and collect from each stockholder his pro rata share of the amount necessary to repair the capital of the corporation. It follows that, when the insurance commissioner has made his requisition upon an insurance company to make good its impaired capital, the liability of the stockholder for the deficiency has been determined and fixed, and the stock is thereafter subject to the incumbrance of the requisition. It would follow it in the case of a transfer, and affect its value as security. From the moment of the making

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of the requisition by the commissioner, there is imposed upon the stockholders the liability to pay their proportionate amounts of the deficit, or to suffer a total loss by the forfeiture of the charter and consequent dissolution of the corporation. This being true, the liability of the stockholder is not entirely dependent upon the form of the resolution levying the assessment, and, if the defendant in error gave the note in controversy for the purpose of discharging her liability under the requisition of the commissioner, there was undoubtedly a consideration for the note, which could not be defeated by a technical defect in the formal levy of assessment. But the defendant in error, in her affirmative defense, charges that the note was obtained by fraud, through false statements and representations. It is the general rule that whether or not there has been fraud in any given case, and whether there have been false representations by the party charged with the fraud, is a question for the jury to determine in actions of law. Stewart v. Cattle Ranche Co., 128 U. S. 383, 9 Sup. Ct. 101, 32 L. Ed. 439; Bartlett v. Smith (C. C.) 17 Fed. 668. The question of the sufficiency of the consideration for the note not being dependent upon the legality of the assessment, but upon the circumstances and conditions under which the note was executed, the question is one of fact to be determined by the jury from the evidence. Judgment reversed, and the cause remanded for a new trial.

(107 Fed. 227.)

UNITED STATES, to Use of FIDELITY NAT. BANK, v. RUNDLE et al.

(Circuit Court of Appeals, Ninth Circuit. February 4, 1901.)

No. 611.

1. CONTRACTOR'S BOND—LIABILITY OF SURETIES.
   Sureties on a bond of a contractor, conditioned for payment of persons supplying him with "labor or materials," are not liable to a bank which, under an arrangement to supply the contractor with funds, pays the time checks given the laborers and the orders given the material men; the same being indorsed merely as evidence of payment, without any assignments of the claims being made.
2. ACTION ON BOND—JUDGMENT AGAINST PRINCIPAL.
   Judgment by default against the principal in an action on a bond against principal and sureties is, at most, only prima facie evidence against the sureties, who put in issue their liability, and incidentally that of the principal.

In Error to the Circuit Court of the United States for the Eastern Division of the District of Washington.

On July 1, 1897, N. B. Rundle entered into a contract with the United States to erect certain buildings near Spokane in the state of Washington, and in pursuance of an act of congress approved August 13, 1894, executed and delivered a bond to the United States in the penal sum of $10,000, conditioned that the said N. B. Rundle should well and truly and in all respects duly and fully observe and perform the contract, and "promptly make full payments to all persons supplying him labor or materials in the prosecution of the work provided for in said contract." The sureties upon the bond were D. W. Henley and F. E. Snodgrass, the defendants in error. The Fidelity

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National Bank, the plaintiff in error, brought the present action against the defendants in error and N. B. Rundle upon their bond, alleging that during the progress of the work upon the contract numerous persons performed work upon the buildings called for by the contract and furnished materials used therein, and that the said laborers and material men, prior to August 13, 1898, assigned their claims to said bank, the claims amounting to $6,868.71 for materials and $2,603.79 for labor. Rundle made no appearance, and default and judgment were taken against him. The defendants in error answered, denying that the claims had been assigned to the plaintiff in error, and alleging as an affirmative defense that the plaintiff in error, without the knowledge of the defendants in error, entered into an agreement with Rundle whereby it was to wait for the pay on said claims 30 days, or from estimate to estimate as made by the officer representing the government in said contract, and that by such extension of credit the defendants in error had become released from liability upon the bond. Upon the issues so made, the case was tried before a jury, and a verdict was rendered for the plaintiff in error for the sum of $3,115.21 and interest. In the verdict it was specified that the amount so found was upon three certain claims for materials that had been assigned to the plaintiff in error, and $339.45, with interest thereon, for labor which had been paid upon time checks approved and authorized by D. W. Henley, one of the defendants in error. See 100 Fed. 400.

Happy & Hindman, for plaintiff in error.

Henley, Kellam & Lindley and A. G. Avery, for defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Upon the writ of error it is now contended that the trial court erroneously charged the jury concerning the effect of the extension of time which was given to N. B. Rundle by the Fidelity National Bank. It is urged that the agreement which was made between Rundle and the bank to extend the time of payment from estimate to estimate as made upon the work was an extension for no definite period, and that therefore it did not operate to release the sureties, and that the agreement to extend was without consideration, and was not binding upon the bank. The transaction between Rundle and the bank is fully set forth in the bill of exceptions. It appears that when Rundle found that the contract was to be awarded to him he went to the president of the bank to make arrangements for a loan of money to help him carry it out. An arrangement was made whereby the bank was to furnish him from five to ten thousand dollars, as might be required, to pay for labor, and to pay what might be needed to carry the work along during the time between each estimate, for which the bank was to receive an assignment of the total amount due upon the contract, so that the money might be paid to the bank, and not pass through the contractor's hands. It was arranged that the labor debts should be paid by time checks, and that the bank should receive its compensation by discounting the time checks 3 per centum. This was the understanding as testified to by all the witnesses. Nothing was said in any of the conversations concerning an assignment of the claims of laborers and material men to the bank, and none of such claims were in fact assigned to the bank, except the three claims mentioned in the verdict. Those were claims for materials which had been furnished the

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contractor upon the guaranty of the bank, and after payment had been formally assigned to the bank. The time checks for labor were, in form, certificates that the laborer had worked a designated number of days in a month named, at a certain rate per day, stating the amount due, containing upon their face the words, "Fidelity Bank, please pay," and signed by Rundle. They were in effect checks upon the bank drawn by Rundle in favor of the laborers. The whole transaction, as it is detailed by all the witnesses, amounted to an agreement whereby the bank agreed to loan money to Rundle to carry out his contract, and to permit him to check out the loan as required to pay the laborers. When the time checks were paid by the bank they were indorsed as any other checks would have been indorsed by the payees. There is nothing in the circumstances to show an assignment to the bank of any of these time checks for labor or the orders for the payment of material men, or that it was the intention of the bank to take such assignments, or to become substituted to the rights of such payees. The answer of the defendants in error distinctly placed in issue the allegation of the complaint that such accounts had been assigned to the bank. The testimony sustains their denial, and shows that no assignment was made. Nor can it be claimed that the law will raise a presumption of an assignment upon the facts in the case. It is true that an assignment may in some cases be made by parol, and that under certain circumstances the presumption will arise that an assignment was intended solely from the nature of the transaction. But in the circumstances of the present case we discover nothing upon which to rest such a presumption. The agreement was wholly between the contractor and the bank. The laborers and the material men were not parties to it. They took their checks and their orders to the bank as directed, and were there paid. The checks and orders were indorsed as evidences of payment, and for no other purpose, and the bank retained them as vouchers. In this there was no assignment. Martin v. Railroad Co., 62 Mich. 458, 29 N. W. 40; Dudley v. Railway Co., 65 Mich. 655, 32 N. W. 884.

If there was no assignment to the bank of any of the claims save those mentioned in the verdict, there could be for the unassigned claims no liability to the bank upon the bond; for the protection afforded by the bond was to such only as might supply the contractor with labor and materials in the prosecution of his work. It did not extend to a bank which might lend money for the purpose of paying for such work and materials. But the plaintiff in error contends that the judgment rendered against the contractor in the present action is evidence against the sureties of all the facts pleaded in the complaint, and that they cannot now dispute the assignment of the claims. The rule which is sustained by the weight of authority is that a judgment against the principal upon a bond such as that here sued upon is not admissible in evidence against the sureties, except: First, in cases where the bond is conditioned to pay such judgment as may be rendered against the principal; and, second, in cases in which the sureties have had the opportunity to appear and defend in the action against the principal,—and that the

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judgment, when so admissible, is "evidence against the surety of the fact of its recovery only, and not evidence of any fact which it was necessary to find in order to recover such judgment." Brandt, Sur. (2d Ed.) § 630, and cases there cited. The present case does not come within the letter of the first exception to the rule, nor within the spirit and intent of the second. This is not a case in which the sureties had the opportunity to defend, and failed to defend, an action which was brought against their principal. This is not the ordinary case in which a judgment has first been obtained against the principal, and a second action is brought against the sureties to compel its payment. In such a case the first judgment is held to be evidence against the sureties, for the reason that it is the result of a judicial investigation in which the sureties might have availed themselves of the opportunity to make a defense for their principal. Here the action is brought in the first instance against the principal and his two sureties. The principal, presumably for the reason that he owed the bank the full amount for which the action was brought, and had no defense, made no appearance in the action. Judgment by default was rendered against him. But at the same time that this was done the sureties were in court in the same action with their answer to the complaint denying the assignment of the claims to the bank, and denying, so far as the unassigned claims were concerned, their own, and incidentally their principal's, liability upon the bond. Upon what principle can it be said that the silence of the contractor—his failure to make answer—can be shown in evidence against the sureties upon the very issues which they had raised both for him and themselves upon their denial that certain of these claims had been assigned to the bank? But, in any view of the effect of the judgment against the principal, it could be no more than prima facie evidence against the sureties. Moses v. U. S., 166 U. S. 571, 17 Sup. Ct. 682, 41 L. Ed. 1119; Trust Co. v. Robinson, 24 C. C. A. 650, 79 Fed. 420; City of Lowell v. Parker, 10 Metc. (Mass.) 309. The evidence which was produced by the defendants in error is more than sufficient to overcome such prima facie presumption. The testimony discloses all the circumstances of the loan from the bank to Rundle, the particulars of their understanding, and the details of the dealing of the bank with the laborers and the material men, and it shows that in fact there was no assignment to the bank of claims other than those which were specified in the verdict.

The view which we take of the question of the assignment of these claims as shown by the record renders it unnecessary to discuss the other questions which are presented. The judgment will be affirmed.

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(107 Fed. 230.)

SOMMER v. CARBON HILL COAL CO.

(Circuit Court of Appeals, Ninth Circuit. February 11, 1901.)

1. REBUTTAL—CUMULATIVE EVIDENCE—DISCRETION OF COURT.
   Plaintiff, in an action for an injury received by him, while in defendant's employ in a coal mine, from explosion of gas, through the alleged negligence of the fire boss in failing to attend to the ventilation on complaint of plaintiff, having in his case in chief given evidence of the nature of the duties of the fire boss, and defendant having met this by evidence that a published rule of defendant required complaint to be made to the mine foreman, and that no one but him had any right to interfere with the ventilation, it is in the discretion of the court to refuse to receive on rebuttal testimony that it was the duty of the fire boss to attend to ventilation on complaint; this being but cumulative evidence of what plaintiff was required to prove in opening his case.
2. MASTER'S DUTY—INSTRUCTIONS—STATUTES.
   The question of the duty of a coal-mine owner as regards ventilation being controlled by a statute providing for ventilation by certain means and in a certain manner, it is sufficient for the court, in instructing as to the master's duty, to read the statute.

In Error to the Circuit Court of the United States for the Western Division of the District of Washington.

This cause comes into this court a second time upon writ of error. The first writ was brought to review a judgment which was rendered by the circuit court, sustaining a demurrer to the complaint upon the ground that it affirmatively appeared therein that the negligence and wrong complained of by the plaintiff were the negligence and wrong of his fellow servant, for which the defendant was not legally liable to respond in damages, and upon the further ground that it was shown in the complaint that the plaintiff's own negligence was a contributing cause of his injury. The complaint upon which that judgment was rendered alleged that the plaintiff was a coal miner in the employment of the defendant, and that the defendant had failed to comply with the regulations of the statute of Washington requiring the ventilation of its mine; that upon the day on which he was injured the plaintiff was employed in driving a chute, and that while working on the face of the chute a short time before the accident he noticed gas accumulated at his working place, and that said accumulation of gas was owing to insufficient ventilation, which was due to the negligence and carelessness of the fire boss, one John Lowery; that soon after noticing the accumulation of gas the plaintiff complained to Lowery that there was gas accumulating at his chute, and requested him to furnish more air and better ventilation; that Lowery neglected his duty in this respect, and the plaintiff, believing that Lowery had performed his duty and had freed the chute from gas, proceeded to the face of the chute for the purpose of setting off a charge of giant powder by a fuse thereto attached, and lighted a match for that purpose, thereby igniting the gas and causing an explosion thereof. This court (32 C. C. A. 156, 89 Fed. 54) reversed the judgment of the circuit court sustaining the demurrer, and ruled that, since the complaint did not state the length of time that had transpired between the notification given to the fire boss by the plaintiff and the time when the explosion occurred, it would not be presumed that a sufficient interval had not elapsed to justify the plaintiff in believing that the fire boss had fulfilled his duty, and had caused a proper ventilation of the plaintiff's working place. The cause was remanded to the circuit court for trial. During the progress of the trial the plaintiff amended his complaint. He omitted therefrom his former allegation that he noticed the presence of gas at his working place in the chute and reported that fact to the fire boss, and substituted therefor the allegation that the plaintiff noticed that the ventilation of said working place was not sufficient to clear the same from

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gas and smoke as quickly and readily as it should be made to do so for the safety required in such places in said mine, and that soon after noticing such lack of air and ventilation he complained to the said Lowery that there was not enough air at the face of the chute, and notified him that said lack of air and ventilation was due to the opening of a certain canvas gate which is described in the complaint. The theory of the plaintiff upon the trial was that immediately preceding the accident he did not have actual knowledge of the presence of gas at his working place, nor report the presence of gas to the fire boss, but that he did know that the ventilation was not sufficient to keep the chute clear of gas and smoke. The trial resulted in a verdict and judgment for the defendant. See 91 Fed. 337.

Govnor Teats and James Hamilton Lewis, for plaintiff in error.

J. M. Ashton, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The plaintiff in error contends that the court erred in excluding certain evidence, and in giving and refusing certain instructions to the jury. It is said, first, that there was error in excluding the evidence of witnesses who were offered in rebuttal to show the nature of the duties of the fire boss. In his case in chief the plaintiff had offered affirmative evidence to support the allegations of his complaint concerning the nature of the duties of John Lowery, who was designated the "fire boss," and through whose negligence it was alleged that the accident occurred. The defendant met this testimony by introducing evidence tending to prove that one of the published and permanent rules which govern the operation of its coal mine required the plaintiff, on discovering the gas at his working place, either to report to the mine foreman or leave the mine, and that no one but the mine foreman had the right to interfere with the brattice or other arrangement for conducting air into the different crosscuts and chutes in the mine; and it offered evidence tending to show that it was absolutely necessary for the safety of miners in different parts of the mine that the arrangements for distributing air and ventilating the mine should be under the control of one person. It was in response to this testimony that the evidence was offered in rebuttal which was excluded by the court. The plaintiff called witnesses who had worked as miners in the mine, and offered to prove by them that it was the duty of John Lowery, the fire boss, to arrange the canvas gate in the big crosscut when requested by the plaintiff, to give the plaintiff more air; that that was one of the duties of the fire boss. The court sustained an objection to this testimony on the ground that it was not proper in rebuttal. It is contended that this ruling was error, and that the plaintiff should have been permitted to show that, notwithstanding the published rule of the company relegating to the mine foreman the entire supervision of ventilation, there was a general disregard of the rule, and that in fact, in violation of the rule, the fire boss was in the habit of attending to the ventilation upon the complaints of the miners. But this was not the offer of evidence that was made to the court. There was no suggestion that the plaintiff sought to prove that the defendant had violated its published rule. The testimony was prof-

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fered to show the duties of the fire boss, through whose negligence the complaint alleged that the accident occurred, and whose duties the plaintiff had attempted to show in his case in chief. Under these circumstances, there was clearly no abuse of the discretion which was vested in the circuit court to exclude the evidence as not proper in rebuttal of the defendant's testimony. If the plaintiff desired to prove the existence of a custom which practically annulled the rule of the company, he should have made that fact clear to the court. As the offer was made, it came only as cumulative evidence upon what the plaintiff had shown in his evidence in chief concerning a matter which, under the rules of evidence, he was required to prove in opening his case.

Error is assigned to the instruction which the court gave concerning the question of the plaintiff's negligence, as follows:

"If he was negligent in not making a protest that there was not proper ventilation at the place where he was working, and that there was gas accumulating there, he cannot complain against the company; but, with that single exception, the question of who was negligent is not important, but the question is, was there negligence?"

It is said that this charge to the jury, and several portions of the charge which follow it, rest upon a supposed or conjectural state of facts, of which no evidence existed. It is contended that the evidence shows that the plaintiff did not immediately preceding the accident have actual knowledge of the presence of gas at his working place, and that he did not report the presence of gas to the fire boss. The record does not sustain this contention. The plaintiff testified that after he had drilled a hole about four feet at the end of the chute he went down to the crosscut to fetch some powder and his fuse, and that while doing so he went where he could see some one in the gangway, and that in the big crosscut he saw John Lowery. "He asks me, 'How is it up there?' 'Well,' I tell him, 'we need more air up there. Shut the canvas gate,—the hole in the canvas gate down in the crosscut. We got more gas down there.' He says, 'All right.'" The defendant in error urges that the plaintiff in so testifying did not mean to say that there was gas at the working place, and that it appears from the remainder of his testimony that all that he complained of was the lack of ventilation, and that he wished to secure better ventilation to prevent the accumulation of gas. We do not so understand his testimony. The bill of exceptions shows that he said to Lowery. "We got more gas down there." That statement stands unexplained and unmodified in the evidence. It was undoubtedly the evidence upon which the complaint was originally prepared. Up to the time of the trial of the case before the jury the complaint contained the averment that the plaintiff discovered gas where he was working before he made complaint to the fire boss. Notwithstanding the amendment, the plaintiff testified as above quoted. He was not cross-examined upon this statement, nor was he asked to explain it. The remainder of his testimony upon the same subject is not of such a nature as to convince us that he did not mean exactly what he said when so testifying. We have no ground, therefore, for saying that the trial

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court in his charge to the jury erred in assuming as proven a fact which had thus been deliberately testified to by the plaintiff himself.

It is contended that the court erred in refusing to give to the jury the instruction which was asked for by the plaintiff in error as follows: "It is the duty of the owner or operator of the mine to furnish a safe place in which the miners are to work." The whole question of the defendant's duty, so far as safety as to ventilation in its mines was concerned, is controlled by the statute of the state of Washington which makes provision for ventilation of coal mines within the state by certain means and in a certain manner, to prevent the accumulation of gases. In instructing the jury the court read that statute, and it was not required to do more. On the former decision of this case we said that the statute of Washington was, "in effect, the measure of that reasonable care which the owner or operator of a coal mine is required to take to avoid responsibility for injuries to workmen arising from accidents of this character." The case of Deserant v. Railroad Co., 178 U. S. 409, 20 Sup. Ct. 967, 44 L. Ed. 1127, relied upon by counsel for plaintiff in error, is not in conflict with these views. We find nothing in the decision of that case which affects the questions which are presented here. It was held in that case that the act of congress regulating the ventilation of coal mines in the territory of New Mexico required that the mines be kept clear of standing gas, and that if this were not done the consequence of neglecting to comply with the statute could not be excused because some fellow servant might have disregarded instructions. The instructions which are complained of in the present case concern the question of the plaintiff's contributory negligence. The statute of the state of Washington does not modify or alter the general rule that the plaintiff cannot recover if his own negligence has contributed to his injury. We find no error in the record. The judgment will be affirmed.

(107 Fed. 236.)

CITY NAT. BANK OF DALLAS v. DOOLITTLE et al.

(Circuit Court of Appeals, Fifth Circuit. February 19, 1901.)

No. 1,008.

1. BANKRUPTCY—COMPOSITION WITH CREDITORS—CONFIRMATION.

Specifications in opposition to confirmation of a bankrupt's composition with creditors must be similar to specifications in opposition to a discharge, which, to conform to Bankr. Act 1898, §§ 14, 29, should show fraud on his part; and so, where specifications did not charge fraud, nor that the offer and acceptance were not in good faith, but did charge that the composition was not for the best interest of creditors, and a referee twice reported (the last time very fully, and accompanied with the testimony), finding in each case that it was for their best interest and was offered and accepted in good faith, the objecting creditor having the burden of proof, the court properly confirmed the composition on the referee's reports; confirmation being authorized by section 12d if the court is satisfied that it is for the best interest of creditors, that the bankrupt is not guilty of anything barring a discharge, and that the offer and acceptance were made in good faith.

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2. SAME—ORDER OF CONFIRMATION—VACATION—DUTY OF OBJECTING CREDITORS.
It is the duty of a creditor objecting to the confirmation of a bankrupt's composition with creditors to show by proper averments and by evidence sufficient grounds why the court should grant a rehearing and set aside the order confirming the composition.

Appeal from the District Court of the United States for the Northern District of Texas.

J. M. McCormick, for appellant.
M. L. & W. L. Crawford, for appellees.

Before PARDEE and SHELBY, Circuit Judges, and TOULMIN, District Judge.

TOULMIN, District Judge. This case comes into this court on appeal from the decree of the district court confirming the composition offered by the bankrupts to their creditors. The several grounds on which the decree is attacked, as appears from the assignments of error, are:

"(1) That the court sustained the plea and exceptions of the bankrupts to the specifications in support of the appellant's opposition to the confirmation of the composition; (2) that the court confirmed the composition against the appellant's opposition, and the specifications in support thereof, without a hearing of the matters of fact set up in the specifications; (3) that the court held that the composition was for the best interest of the creditors; (4) that the court confirmed the composition, when it appeared from the record that neither the bankrupt nor the trustee was contesting in any way the preference which had been received by other creditors, but that said bankrupts were contesting the preferences received by the appellant; and (5) that the court confirmed the composition, against the appellant's opposition, and the specifications in support thereof, when it appeared from said specifications and the record that the effect of such confirmation would be to allow all the creditors, save the appellant, who had received preferences within four months, to retain their preferences, but would require the appellant, before coming into said composition and participating therein, to give up the preferences received by it within said time."

The specifications in opposition to the confirmation must be of the same character and nature as the specifications in opposition to a discharge. Coll. Bankr. 147. To bar a discharge the bankrupt must have committed an offense punishable by imprisonment under the bankrupt act, or, with fraudulent intent to conceal his true financial condition, and in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of account from which his true condition might be ascertained. Bankr. Act, § 14. A bankrupt is punishable by imprisonment if he knowingly and fraudulently concealed from his trustee any of the property belonging to his estate in bankruptcy, or made a false oath or account in or in relation to any proceeding in bankruptcy. Bankr. Act, § 29. On the hearing of an application for the confirmation of a composition, and such objections as may be made thereto, "the judge shall confirm the composition if satisfied that (1) it is for the best interests of the creditors; (2) that the bankrupt has not been guilty of any of the acts, or failed to perform any of the duties which would be a bar to his discharge; and (3) that the offer and acceptance are in good faith." Bankr. Act, § 12d.

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The record shows that all proceedings preliminary to the application for confirmation of the composition as required by the bankrupt act were had in this case, and that on May 16, 1900, the application was filed. A time was fixed for the hearing of the application and such objections as might be made thereto. Under the rules of court, and also by special order of the judge, 10 days were allowed for filing objections. At the same time it was ordered that at the expiration of the 10 days the application be referred to the referee, that due notice to the creditors be given, and that the referee file his report thereon by June 5, 1900, on which day the matter was set down for hearing before the judge. On May 17, 1900, the City National Bank of Dallas, the appellant, whose claim had not been proved, but was recognized and listed in the bankrupt's schedule, entered its appearance in opposition to the confirmation of the composition on the ground that it was not for the best interest of the creditors, and stated therein that it would file the specifications of its opposition, in writing, within 10 days. On June 5, 1900, the referee filed his report that due and proper notice had been given to all known creditors; that a majority in number and amount of those who had proved their claims had accepted, in writing, the proposed composition; that the offer was fair and reasonable and for the best interest of the creditors; and that the offer and acceptance were in good faith. And he recommended that the composition be confirmed by the court. On the day this report was filed the City National Bank of Dallas, by leave of the judge, filed its specifications of objection to the confirmation. On the same day an order of reference was made by the judge, directing the referee to examine and report his conclusion on the questions involved in the specifications, and also whether the bank occupied such status as a creditor as carried with it a right to oppose the confirmation of the composition. In the specifications of objection to the confirmation of the proposed composition filed by the bank we find no charge that the bankrupts had been guilty of any of the acts or had failed to perform any of the duties which would be a bar to their discharge, and we find no charge that the offer and acceptance were not in good faith, but the specifications are all to the effect that the proposed composition is not for the best interest of the creditors. There are several grounds stated on which, it is claimed, the composition is not for the best interest of the creditors and should not be confirmed, but no fraud on the part of the bankrupts is anywhere charged. It is alleged that the assets of the bankrupt estate, if administered by the court to a final distribution among the creditors who have a right to prove their claims, would realize a greater per cent. to such creditors than that offered in composition, and it is also alleged that the claims of some of the creditors listed in the schedule are not provable claims; and it is inferentially charged in the specifications that the bankrupts had made misrepresentations to their creditors to induce them to accept the composition offered.

On June 9, 1900, the referee made a very full report, accompanied by testimony, on the questions referred to him in the order of June

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5th, in which he finds that the City National Bank of Dallas occupies such a status as creditor as gave it a right to oppose the confirmation, that the offer of the composition and its acceptance were in good faith, and that it was for the best interest of the creditors; and he reiterates his recommendation that the composition be confirmed. On the coming in of this report the court made an order confirming the composition, and directing that the money deposited as the consideration therefor be distributed. Several days after this order was entered, the bank filed a petition for a rehearing, and for leave to amend its specifications of opposition to the confirmation. On the filing of this petition an order was at once made setting aside the former order of confirmation of the composition and of distribution, and allowing the petitioner to file amended specifications to its opposition to the confirmation. The petition contained no charge that fraud was practiced in the procuring of the composition, but set up want of sufficient knowledge of some of the proceedings had in the court prior to the order of confirmation, and want of opportunity to be heard in the matter at the time it came on for consideration by the court, reasserting the belief of the petitioner that the composition confirmed by the court was not for the best interest of the creditors, and alleging, as it had theretofore done, that some of the creditors had received preferred payments on their claims. Amended specifications were subsequently filed, setting up substantially the same grounds of opposition as were contained in the original specifications, filed prior to the order of confirmation, but elaborated, and perhaps more definite. The bankrupts filed exceptions and an answer to said amended specifications, and at the same time moved the court to revoke and annul the order which the court had made setting aside the order of confirmation of the composition, and to reinstate the order of confirmation and distribution.

Section 12d of the bankrupt act defines, as we have seen, the mode by which and the terms upon which a composition may be confirmed:

"The confirmation being confirmed and the consideration distributed, the case is to be dismissed. All proceedings are then at an end, unless the composition thereafter is set aside under the provisions of section 13."

Coll. Bankr. (3d Ed.) 154; In re Rudnick (D. C.) 93 Fed. 787.

The confirmation operates as a discharge. Section 14c, Bankr. Act. Section 13 "defines exclusively the grounds upon which it [the composition] may be set aside." In re Rudnick, supra. The duty is imposed on the court of examining the offer and acceptance, and ascertaining whether the composition is for the best interest of the creditors. "The presumption exists that the action of the majority is for the interest of all the creditors, until it is attacked by those who are interested in showing it to be erroneous." Coll. Bankr. 147, and cases therein cited. The burden is on the objecting creditors to show this. Id.

In the specifications of objection by the City National Bank of Dallas there is an offer to pay a sum of money for the assets of the bankrupts in the hands of the trustee, if the same shall be delivered to it free and stripped of all liens, considerably in excess of the estimated value of such assets. The counsel for appellant contends

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with much earnestness and apparent force that the offer of the bank showed that the proposition of the bankrupts was not for the best interests of the creditors, and was of itself sufficient ground for refusing to confirm the composition. The offer of the bank was one of the special matters considered by the referee on both references had by him. In reporting on the two propositions—the proposition of the bankrupts and the offer of the bank—the referee says that:

"Upon a strict pecuniary basis, the difference between these propositions in favor of the City National Bank is $568.28. Under the composition proposed the money deposited by the proponents would be available within a very short time, if not immediately, for the payment of the claims of the creditors, and the entire amount of 25 per cent. would be paid to them at once upon proving up their claims, whereas under the terms offered by the City National Bank the administration could not be safely closed under twelve months from the date of the adjudication, with the consequent delays in the declaration and notices of dividends, the expense to the creditor in collecting his warrant, and the general inconvenience to him in the ordinary administration of an estate in court. The referee is of the opinion that the difference, upon a pecuniary basis, between the offer of the bankrupts and the proposition of the City National Bank would not be compensatory for the delays, inconveniences, and expenses which would necessarily follow upon the acceptance of the bank's proposition, and that, taking into consideration these elements, it is not for the best interests of the creditors to accept the proposition of the City National Bank, and therefore finds as a fact, under the second direction in the order of reference herein, that the composition offered by the bankrupts is for the best interests of the creditors of said bankrupts,"—and further reports the discrepancy between the probable value of the assets and the composition offered to be small and reasonable.

Section 13 of the bankrupt act provides that:

"The judge may, upon the application of parties in interest, filed at any time within six months after a composition has been confirmed, set the same aside and reinstate the case if it shall be made to appear at the trial that fraud was practiced in the procuring of such composition, and that the knowledge thereof has come to the petitioner since the confirmation of the composition."

No such application was made in this case, and it has been held that section 13 "defines exclusively the grounds upon which it [the confirmation] may be set aside." Coll. Bankr. 157, 158; In re Rudnick (D. C.) 93 Fed. 787. But we do not decide that the court may not, under certain circumstances, set aside the confirmation of a composition and reinstate the case, just as courts in general may open their judgments. We do not consider it necessary to decide that question in this case, nor do we consider it important to specially notice the bankrupts' exceptions to the amended specifications of objection by the bank. In our view of the case, it is wholly immaterial what the ruling of the district court was on such exceptions, or whether the bankrupts filed any exceptions at all. It was the duty of the bank to show, by proper averments and by evidence, sufficient grounds why the court should grant a rehearing and set aside the order confirming the composition. Such is the rule in proceedings on objections to the confirmation of a composition and to a discharge of the bankrupt, and this rule should apply with equal, if not greater, force to applications to set aside a composition which has been confirmed. Coll. Bankr. 147, 160, 161; In re Logan (D. C.) 102 Fed. 876. The bank did not meet the requirements of this rule. We think the district court was

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right in making the order confirming the composition on the reports of the referee, and that it was right in revoking and annulling the subsequent order setting aside the order of confirmation and reinstating the former order; the bank having failed to show any new or sufficient ground why the confirmation should be set aside or denied.

In reference to the point suggested in the fifth assignment of error, we may remark that, because the effect of the confirmation of the composition might be to allow all the creditors who had received preference payments within four months to retain their preferences, it does not follow that the bank must give up its preferences, to entitle it to participate in the composition. The record shows that its entire claim is recognized and listed by the bankrupts in their schedule, and that the claim is included in the estimate of the amount required under the composition; in other words, that it is provided for in the composition. While the bank's claim was excepted to by the bankrupts as not being a provable claim, because the bank had received preference payments within four months, the point of the exception was, as we understand the contention, that the bank, having a nonprovable claim, was not in such position as creditor as entitled it to oppose a confirmation of the composition. The claim was not disallowed, or its validity or provability passed on by the court, so far as the record discloses. We find no error in the record prejudicial to the appellant, and the decree must be affirmed.

(107 Fed. 277.)

THOMSON-HOUSTON ELECTRIC CO. v. NASSAU ELECTRIC R. CO. et al.

SAME v. BULLOCK ELECTRIC CO. et al.

(Circuit Court of Appeals, Second Circuit. February 27, 1901.)

Nos. 81, 102.

1. PATENTS—INVENTION—ELECTRIC SWITCHES.

The Thomson patent, No. 283,167, for improvements in electric switches or commutators, as to claims 1 and 4, the essential feature of which is the use of a magnet to dissipate, or prevent the formation of, an arc between the separated parts of the conductor when an electric current is broken by means of a switch, for the purpose of preventing the burning of such parts, is void for lack of patentable invention. The influence of a magnet on the arc formed in a disconnected circuit was previously well known, and the result of preserving the contact points of an electric switch from injury by combining a magnet with such switch, which is the essence of the claims of the patent, is so much a part of the known result of its action that it cannot be claimed as a new discovery or render the combination patentable.

2. SAME.

The Thomson patent, No. 401,085, for a shield designed to retain the arc formed in breaking an electric circuit, by means of a switch, within the field of a magnet, used, in combination with the switch, to rupture or dissipate such arc, and prevent the burning of the electrodes, and which, as described in claims 1 to 6 of the patent, consists in covering the poles of the magnet, or the electrodes, or both, with a coating of insulating material, such as enamel, is void for lack of patentable invention;

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being merely the application to a new device of well-known mechanical means of insulation to accomplish the old result of preventing the injurious escape of an electric current.

Appeal from the Circuit Court of the United States for the Eastern District of New York.

Appeal from the Circuit Court of the United States for the Southern District of New York.

The first-named suit, known in the litigation as the "Nassau Case," was brought in the circuit court for the Eastern district of New York to prevent the alleged infringement of claims 1 and 4 of letters patent No. 283,167, dated August 14, 1883, to Elihu Thomson, for an improvement in electric switches. The bill was dismissed for want of patentable novelty of the invention described in those claims. 98 Fed. 105. The second suit, known as the "Bullock Case," was brought in the circuit court for the Southern district of New York, and was based upon the alleged infringement of the same patent, No. 283,167, and of letters patent No. 401,085, dated April 9, 1889, to Elihu Thomson, for an improvement in electric arc-rupturing devices. The court followed, without discussion, the conclusions of Judge Thomas respecting the earlier patent, dismissed the bill as to that patent, and held that No. 401,085 was valid, and had been infringed as to six claims, and a decree was entered for the complainant accordingly. 101 Fed. 587. The complainant appeals from the decree of the circuit court for the Eastern district of New York, and each party appeals from the decree of the court for the Southern district.

F. H. Betts, for appellant Thomson-Houston Electric Co.

Clifton V. Edwards, for respondents Bullock and others.

W. H. Kenyon, for respondents Bullock and others and Nassau Electric R. Co. and Lorain Steel Co.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge (after stating the facts as above). The object of the invention described in claims 1 and 4 of No. 283,167 was to increase the durability of electric switches, when, upon being opened to break circuits, an electric arc is formed across the switch contacts, with resultant injury to the switches. A switch is, in general terms, "a device for opening and closing a single circuit in some regular and systematic manner." The switch which is in ordinary commercial use "involves two stationary terminals connected to the opposite branches of a circuit, and a removable bridging piece inserted between such two terminals to complete the continuity of the circuit, or withdrawn therefrom to interrupt the circuit." This interruption is a frequent necessity, especially in the operation of trolley railways, where the current is large, and the amount of force employed must constantly be subject to change. Whenever the continuity of the circuit is interrupted by throwing open the bridge, an air gap is introduced, over which the current continues to flow until the air gap becomes too wide and makes too great resistance to the pressure of the current. This flow over the air gap is called an "electric arc," and is "mainly a stream of metallic vapor," which comes from the fusing and vaporizing of the contacts, or of the electrodes; for an electric arc "is the source of an intense heat and light." The switches, being made of copper, are easily burned or melted, and the contact portions are left in a rough condition, which interferes with perfect contact when the switch is closed. To pre-

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vent this burning or fusing was the object of the invention. The remedy is shown in the specification, as follows:

"My invention relates to switch or commutator devices for breaking, changing, or shifting electric circuits, and more particularly to switches or commutators designed for use in connection with electric lighting systems, although it is not confined to devices used in such connection, but is intended to include electric switches or commutators generally, when used in combination with circuits designed to carry currents of considerable electro-motive force, or of sufficient electro-motive force to cause a tendency to the formation of electric arcs across the switch contacts on breaking circuit, or when used in connection with any other apparatus, such that there is a tendency to the formation of arcs or sparks at the switch or commutator surfaces. The object of my invention is to increase the durability of electric switches or commutators, and to prevent damage thereto from the causes mentioned. More specifically, my invention is designed to prevent damage to the commutator brushes and segments by the formation of arcs or sparks at the commutators of dynamo-electric machines, and likewise to lessen the tendency to short-circuiting of the armature coils by the residuary spark of rupture. To these ends, my invention consists in combining, with the contact surfaces or points for an electric switch or commutator, suitable means for producing a magnetic field in proximity to the contact surfaces; such, for instance, as a magnet whose poles are placed near to the said contact surfaces or points, so as to break, displace, or disperse any electric spark or arc that may form, or tend to form, at such contacts, said magnet acting for this purpose by virtue of the tendency of an arc or heated conductor to move out of or into a magnetic field, according to its direction. * * * Any desired form or construction of an electro-magnet may be employed, and said magnet may be applied in any desired way, provided it be suitably arranged to bring the attractive or repulsive action of a magnetic field to bear upon any spark, arc, or electric current that may pass, or tend to pass, at the time of breaking or commutation, so as to diffuse or displace the same. I have herein shown a magnet for producing or bringing a magnetic field to bear; but other means for producing or bringing to bear the desired magnetic influence may be employed, such, for instance, as a conductor forming the path of an electric current."

Claims 2 and 3 of the patent relate to the combination of a magnet with the commutator of a dynamo-electric machine, and are not involved in this suit. Claims 1 and 4 are as follows:

"(1) The combination, with an electric switch or commutator, of a magnet placed in proximity to the switch contacts, or to surfaces between which a spark or flash is liable to occur, substantially as and for the purpose set forth. * * * (4) The combination, with the contact points or surfaces in an electric switch or commutator, of suitable means for producing a magnetic field in proximity thereto, which field shall act, by its attractive or repulsive influence, to diffuse or displace any electric arc or current that may pass, or tend to pass, at the instant of break or commutation."

In the invention, Thomson made use of a law of nature; that is, a law of electro-magnetism which had long been known by scientists. For example, De La Rive published in 1846 as follows:

"Davy was the first who observed that a powerful magnet acts upon the voltaic arc as upon a movable conductor traversed by an electric current; it attracts and repels it, and this repulsion and attraction manifests itself by a change in the form of the arc. Even the action of the magnet may, as I have found, break the arc by too great an attraction or repulsion exerted upon it, causing the communication which the transmitted particles establish between the electrodes to cease."

The appellees rightly assert that it had been common knowledge among electricians for years prior to 1883 that a magnet would act

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to deflect, displace, and even extinguish an electric arc. While a law of nature—the mere principle—is not patentable, the inventor of means by which the principle can be utilized may be entitled to a patent. The new application of the law by the described mechanical means to a new purpose, which affords a new and useful practical result, is patentable.

The complainant insists that the scientists before Thomson, who discovered the law which has been stated, had learned simply the effect of a magnetic field upon a voltaic arc between two broken pieces of wire, knew nothing of its utility in connection with the switch in commercial use, which is a modern structure, and that the mechanical application of the law to such a structure, which prolonged its life, created a new and useful result, and was patentable. It is probable that the scientists had not obtained their knowledge by experiments upon switches or devices in actual use, and we have no doubt that by the switch of the patent is meant one in commercial use, which is a device for opening and closing a circuit in a regular and systematic manner. The trouble, however, in finding that the extinguishment of the arc which arises from the opening of a commercial switch is a new purpose, arises from the fact that the interrupted circuit of the scientists was a crude switch, and, as appears from Mr. Daniell's published account, the current was of sufficient strength to create both light and heat to a painful degree. The case is not one of the ordinary kind in which laboratory experiments produce surmises or predictions of what may be done, but the knowledge which existed in 1883 was of what had been done by the action of a magnet upon a voltaic arc between the two ends of an interrupted conductor.

The next and main proposition of the appellant is one persuasively pressed both by counsel and experts, and is stated in this way: "In the present case, it was well known that an arc would be produced if an electric circuit was broken, and it was also well known that, if an arc was brought into the field of force of a magnet, such arc would be deflected, and finally extinguished." But Prof. Thomson's discovery was that, "by practically applying a magnet properly located in proximity to the contact points of an electric switch, the contact surfaces would be effectively preserved from the burning effects of the arc produced at those contact points when the circuit was broken by the electric switch." "What Prof. Thomson did was to make a new and improved structure or combination, viz. a switch whose contacts would remain permanently smooth and unroughened by being combined with a magnet, and he was enabled to make this new structure by discovering for the first time the capacity of a magnet to subserve that purpose. This is something much more specific and practical than the mere knowledge that arcs destroy electrodes, and that arcs stop their destructive work when they cease to be. * * * The new thing that Prof. Thomson 'found out' was that a magnet, when combined with a switch structure (whose contacts must be smooth and clear), would modify an arc, even if of high potential, and push it across the surfaces so rapidly as to preserve their requirements as contacts." The preservation of the surfaces

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is said to arise from the fact that, in the patentee's structure, the magnet quickly elongated the arc, and caused its roots to so rapidly pass over the surfaces of the contact points that no one point supplied enough material to the arc to damage the surfaces. We do not suppose that the attention of the scientists was particularly called to the beneficial effect of the magnetic field upon contact surfaces, their attention being specially called to its effect upon the hot blazing arc, which they found to have been deflected, and even extinguished, with the result that its fusing power upon the copper conductors had been checked. They saw that the burning arc was turned way from the contact points, and, finally, if a sufficiently strong magnet was used, ceased to burn. The alleged new discovery of a preservative action upon contact points was not noted on paper, and, indeed, is not stated in the patent by Thomson, and is a more detailed statement of the beneficial results of the magnetic field than had been given. Instead of saying the electrodes are not fused, the experts say the contact points are kept smooth. The old scientists said that the magnetic field pulls the arc away from the electrodes and extinguishes it. The experts say, "Yes, and it pulls so rapidly, and scatters the arc so widely, that the contact surfaces are kept smooth, and are not fused." The alleged new discovery of Thomson is so much a part of the known result of the old law as not to deserve the name of a new discovery, or of a new result of Thomson's method of applying the magnet when a switch is opened. The theory of the divisibility of Davy's discovery of the effect of a magnetic field upon a voltaic arc which burns, from the alleged discovery of Thomson of the effect of a magnetic field upon the ends of the severed conductor between which the arc is burning, is not strong enough to bear the weight that the experts place upon it. If the patent was to be sustained, we should rather rest in its support upon the declaration that Thomson applied the law which the scientists observed, in laboratory experiments upon magnets and electric wires, to the switch of modern commercial use and efficiency, and made the experiments of practical utility.

Patent 401,085 is next to be considered. Mr. Bentley states the peculiarity of an electric arc of considerable length, and the consequent difficulty of breaking it, in substance as follows: The arc is an erratic and unstable flame, that darts and twists in all directions. Therefore the poles of the magnet must not be brought close to the switch contacts, lest the arc should come in contact with them in its erratic movement. The magnetic field must also be of sufficient extent to break the arc, or the switch and perhaps some other part of the apparatus would be burned. Therefore the arc must be "restricted in its range of play so that it cannot escape from the magnetic field, but is maintained therein, and compelled to submit itself to the dispersive action of the magnet." The result of this compulsory restriction is that a smaller magnet can be placed in a diminished air gap. The patentee in his specification, after saying that his invention is applicable, not only to this arc-rupturing device in connection with the electrodes of lightning arresters and safety fuses, but also to an arc-rupturing device when

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it is desirable to effect this rupture by a device acting upon the arc itself, says that, to increase the efficiency of all subdivisions, his invention—

"Consists in the application of a shield or septum of insulating material between the opposed surfaces of the arc-rupturing device and the electrodes or conducting bodies between which the arc to be ruptured is formed, thereby preventing an arc from forming at any other portion of the electrodes or conductors than those directly subject to the arc-rupturing force, and permitting the arc-rupturing device, when of conducting material, to be applied, without danger of defective action, very closely to the electrodes. The protecting shield or septum may be of any desired material, and applied in a variety of ways, either to the electrodes or to the arc-rupturing devices, or to both, as may be desired. The arc-rupturing devices I have herein described, for the purpose of illustrating my invention, consist of a magnet applied to the arcing electrodes after the manner described in my prior patent, No. 321,464, of July 7, 1885. When my invention is applied to an arc-rupturing device consisting of a magnet properly arranged with reference to the electrodes across which the arc to be ruptured is formed, the interposed insulating septum or shield may be formed by coating or covering the poles or metallic portions of the magnet with enamel, rubber, or other insulating material, enamel being preferable on account of its incombustible nature. By this means discharges or arcs which might otherwise pass from the poles or electrodes placed in the magnetic field to the magnet pole, thereby escaping the action of the magnet in rupturing the same, are prevented. I find it in fact desirable to apply the insulating shield to all metal portions which are in proximity to the arc to be ruptured, and also to coat or cover the electrodes themselves with insulating material at parts outside of the magnetic field, so that any possibility of a discharge or arc forming at any other portion of the conductors than those directly included in the magnetic field may be avoided."

The six claims which are said to have been infringed, and the validity of which only are to be considered, are as follows:

"(1) In an arc-rupturing device, a shield of insulating material located between the surfaces of the electrodes and the adjacent conducting surfaces of the device by which the arc is disrupted, as and for the purpose described. (2) An arc-rupturing device having its exposed surfaces adjacent to surfaces of the arcing electrodes or bodies shielded with insulating material. (3) The combination, with electrodes liable to abnormal arcing, of an arc-dispelling magnet and a shield of insulating material between opposed surfaces of the magnet and electrodes, as and for the purpose described. (4) In an arc-rupturing device, a magnet whose poles are covered with insulating shields. (5) In an arc-rupturing device, an intercepting shield of solid insulator between the poles of an arc-rupturing magnet and the arcing electrodes. (6) In an arc-rupturing device, magnet portions shielded by an insulating covering, in combination with shielded electrodes having an exposed metal portion wholly within the space within the magnet poles."

There is no doubt that the improvement caused by the insulation described was novel, in that it had not been used before the date of the invention upon arc-rupturing devices of the character mentioned in the patent, was also useful, and that, in connection with other inventions of the same patentee resulting in an automatic circuit breaker, it has been of great value. The question upon the patent is that of patentability.

The thing to be accomplished was to retain the arc in the field of the magnet; that is, to prevent discharges from the electrodes or other portions of the conductors which might escape the rupturing action of the magnet. The mechanical means are simply insulation of the poles of the magnet or of the electrodes or of both.

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The invention is summed up in claim 4 as: "In an arc-rupturing device, a magnet whose poles are covered with insulating shields." The use of insulation for the purpose of preventing the injurious escape of a current of electricity, the mechanical means which the patentee employed, and the ordinary result of insulation were all familiar to the public at the date of the invention, and there was nothing new in the conception of the idea that the way to prevent lateral discharges between conductors was by the interposition of insulation. The complainant insists, however, that the invention consisted in a new location and in a new object, viz. to prevent the arc from escaping, and to assist the arc-rupturing device by preventing the arc from forming in a new situation, and by keeping it located in the path which is needed for its destruction. This mode of expression merely repeats, with more formality, the idea which the patentee had conveyed in his patent, to the effect that by insulation discharges are prevented which might escape the action of the magnet. The object is the old object, and the result is simply the old result of insulation, which is to prevent discharges at an injurious place. The fact that insulation of the poles of the magnet allows their close approach to the electrodes, and thereby enhances the intensity of the field, is a result which was incidental to the main object of the invention; for, after insulation had stopped the danger of lateral discharges from electrodes, the magnet could then be pushed more closely to them. The circuit court was of opinion that the use of insulation, at and in combination with the separated electrodes and the magnetic field, to control the arc during dispersion, possessed patentable novelty. We cannot perceive that the effect of the insulation in an arc-rupturing device was anything more than the old effect, which had always accompanied insulation, and which was accomplished by the old mechanical means, although it was used to prevent lateral discharges in connection with an arc-rupturing device.

The invention of claim 6 does not differ in patentable character from that of the preceding claims, though it is stated more elaborately, and calls for shielded portions of the magnet and shielded electrodes, so that the exposed metallic portion shall be wholly within the space between the magnet poles. It is the combination which the patentee had declared in his specification he thought it desirable to use. The decree of the circuit court for the Eastern district of New York upon patent No. 283,167 is affirmed, with costs.

So much of the decree of the circuit court for the Southern district of New York as relates to patent No. 283,167 is affirmed, and so much of the decree as relates to patent No. 401,085 is reversed, with costs of this court to the defendants, and the case is remanded to that court, with instructions to enter a decree dismissing the bill, with costs of that court.

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(107 Fed. 284.)

MUNICIPAL SIGNAL CO. v. NATIONAL ELECTRICAL MFG. CO.

(Circuit Court of Appeals, Second Circuit. February 7, 1901.)

No. 20.

PATENTS—VALIDITY AND INFRINGEMENT—MUNICIPAL SIGNALING SYSTEM.

The Noyes patents, No. 359,687, for a municipal or police signal system, and No. 359,688, for a transmitting apparatus for such a system, were not anticipated by patent No. 359,686, to the same inventor, and relating to the same subject-matter, nor by anything in the prior art, and are valid. Claims 1 and 2 of the first patent also *held* infringed, and the second, as limited by the first, *held* not infringed.

Appeal from the Circuit Court of the United States for the District of Connecticut.

For former opinions, see 97 Fed. 810, 99 Fed. 569.

This is an appeal from an interlocutory decree of the circuit court, district of Connecticut, finding infringement by defendant of two patents owned by complainant. Both were issued on the same day, March 22, 1887, to Bernice J. Noyes, assignor to the Municipal Signal Company of New Hampshire, the predecessor of complainant, which is a Maine corporation. The patents are No. 359,687, with eleven claims, of which the first two only were held to be infringed, and No. 359,688, with five claims, all of which were held to be infringed. The first claim of No. 359,687 (hereinafter called '87) and the five claims of No. 359,688 (hereinafter called '88) were sustained in the First circuit by Judge Colt at circuit (Municipal Signal Co. v. Gamewell Fire-Alarm Tel. Co. [C. C.] 52 Fed. 464), and by the circuit court of appeals (10 C. C. A. 184, 61 Fed. 948), Judge Putnam dissenting as to No. '88.

Arthur v. Briesen, for appellant.

S. O. Edmonds, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The opinions in the First circuit are full and careful discussions of the patents and the art as there disclosed. So far as this court is in accord with argument or conclusion, it will be sufficient to indicate that fact, without rehearing the same. Thus this opinion may be materially abbreviated, and its discussions confined to matters not before the courts in the First circuit. A somewhat full quotation from No. '87 will best describe the invention, which has for its object a municipal or police signal system:

"A series of signal boxes or substations are connected by an electric circuit with a main station. Each signal box or substation contains a multiple-signaling device for sending signals of different character or significance, and the main station is provided with suitable means for receiving the said signals, and also with suitable means for audibly warning the attendant when signals of one or another character or class are being received. The multiple-signaling device located at the substations consists of a break wheel comprising a disk, a segment or portion of which is insulated from the remaining portion. The periphery of the disk is provided with several groups of signals, so that when brought into co-operation with a contact pen one or another signal is transmitted. The main portion of the disk, or 'break wheel,' as it may be termed, is connected with the main circuit, and the contact pen normally bears upon the periphery of this portion of the disk, said contact pen being also connected with the main circuit. The disk is mounted upon a shaft

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under the control of the operator. Suitable means are provided for locking the contact pen out of contact as the disk is revolved in one direction and for releasing said pen to make contact as the disk assumes its normal position, said means being such as shown and described in another application filed by me concurrently with this. It is herein designed that the main portion of the disk shall transmit the special or want signals by total interruptions of the current. The disk is also so constructed and arranged to be revolved in an opposite direction that the contact pen may make contact with the insulated segment, which is provided with a signaling surface corresponding with the number of the box indicative of its locality, and similar means are employed for disengaging and restoring the contact pen, as previously described. Suitable auxiliary pens are employed, normally in contact with the said segmental portion, which, when brought into co-operation with the revolving disk, interposes a suitable resistance into the line, that the current may be reduced in strength at intervals. Suitable keys are employed for revolving the disk in opposite directions, said keys being so shaped that they can only be employed for the purposes intended.

"It is herein designed that a policeman shall send in his 'on duty' signal by reduction in the current strength, and in this instance, the segmental portion of the disk being employed, only the box number is transmitted. It is also designed that certain authorized citizens shall have access to the boxes when in need of assistance to transmit a signal, such signal in this instance being transmitted upon the main portion of the disk, the keys carried by the citizens being suitably shaped to transmit only the box number, while the key carried by the policeman is so shaped that he can transmit upon the main portion of the disk or multiple-signaling device any desired signal.

"At the main station a relay is interposed in the main line, which responds to both reductions in the current strength, and also to total interruptions thereof, said relay controlling a local circuit, in which any suitable recorder or register is connected, to thus record all signals transmitted by the multiple-signaling device, whether patrol or special signals. Another relay is also connected with the main line, which is adjusted to respond to only total interruptions in the current; said relay, by means of an annunciator drop, controlling a local circuit in which a vibrating or other suitable bell or gong is located, so that when any special signal, or one demanding immediate attention, is received, which in this instance is transmitted by total interruptions in the current, an audible warning is given to the attendant of such fact, calling his attention to the recorder or register, which otherwise he might not do, as the patrol signals are received."

Details of the structures need not be set forth except this:

"A relay, R^1, is included in the main-line circuit, L, which will respond to either a total break or to a reduction in the current, it having a stronger retractor. The armature of the relay R^1 controls a local circuit, L^2, in which is placed a receiving instrument; such, for instance, as an ordinary recorder or registering apparatus, R^2. A relay, R^3, is also included in the main-line circuit, L, which is adjusted to only respond to total breaks in the line, and not to a reduction in the current strength; the armature lever of the said relay R^3, when released, in turn releasing an annunciator, which closes the local circuit L^3, thereby causing a vibrating bell, V, located therein, to continuously vibrate until the drop, r, is positively returned to its normal position. It will be seen that as any special or want signal is transmitted over the main portion, a, of the break wheel the current is rapidly broken, releasing the annunciator drop, r, and also causing the relay R^1 to respond; the operation of the co-operating contact pen c having been previously described. When the patrolman desires to transmit his patrol signal, the break wheel is revolved in the direction of the arrow, 6, thereon until the contact pen c is out of contact, but not breaking the circuit; and when he releases his hold upon the key the break wheel will return to its normal position, and during such movement there will be two circuits from the point 21 to the point 22, over which the current alternately travels,—one over the branch wire 13, contact pen c, contact pen g, and wire 14, including a resistance; and the other over wire 13, contact pen c, contact pen h, and branch wire 15, so

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that the current is alternately reduced in strength and restored to its normal condition; the relay R^1 only responding as previously described. It is obvious that the multiple-signaling device herein described may be employed for transmitting any other class of signals besides that such as herein referred to, and also, if desired, the same may be employed to operate two independent receiving instruments at a central station. I do not desire to limit myself to the means herein shown for interposing the resistance into the main line, as it is obvious that other means may be devised to co-operate with the signal-transmitting apparatus to vary the strength of the current. I claim:

"(1) A system for transmitting signals from a substation to a central station over a main circuit, wherein are combined a multiple-signal transmitter, which is located at the substation, and constructed and arranged to transmit several different signals by current changes of one or another character; a message-receiving instrument at the central station, which receives the signal transmitted; and an audible alarm, also located at the said central station, which responds to the current change of one character only, whereby an audible warning may be sounded for some, and not for other, signals, substantially as described.

"(2) A system for transmitting signals from a substation to a central station, wherein are combined a signal-transmitting apparatus, which is located at the substation, and is constructed and arranged to change the condition of the circuit to transmit different signals; a message-receiving instrument located at the central station, which receives the different signals transmitted; and an audible alarm or indicating signal, also located at the central station, adapted to respond, and thus notify the attendant when some of the messages await reply, but not others,—substantially as described."

Other claims cover the multiple-signaling device, which, as the specification says, may be employed to operate two independent receiving instruments at the central station. They also cover other details of structure, and the use of a resistance as the means for effecting "current changes," or changing "the condition of the circuit." It is quite apparent that a current or circuit may be in a condition of normal flow, or of reduced flow, or of total interruption, and one or other of these conditions may continue for a greater or less length of time.

The courts in the First circuit had before them patents to Stover, Field, and Wilson. Considering the state of the art as thus presented, they found it to be the essence of the Noyes invention that every message of a certain kind must be accompanied by an alarm, while every message of a different kind shall never be accompanied by an alarm; that he accomplished this by the use of a single main circuit, over which all messages pass to a single register or recorder, and while passing there have inherent in themselves a power of self-selection, which, upon arrival, will invariably cause messages of the one kind to sound an alarm and of the other kind invariably not to do so; that such power of self-selection came from current changes in the circuit over which all messages went; and that Noyes was the first inventor of such a system. Wherefore they sustained the first claim broadly for such a system of selective signaling produced by current changes of any character in the main circuit. We concur in their reasoning and conclusion, and it is only necessary to inquire whether the new evidence in the case should lead to a different conclusion. The Henry patent, and the Siemens-Halske publication are briefly treated in argument, and it is enough to say we concur with the circuit court that "they do not, either singly or taken

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together, sufficiently disclose the principles of the Noyes selective-signaling system, or a system of practical use for municipal signaling." The main reliance of appellant seems to be on another patent of Noyes. This is No. 359,686 (hereinafter referred to as '86), issued on the same day as the other patents. The specification reads:

"In accordance with this invention, the multiple-signaling device is employed at the substation, which may be operated to transmit several different signals which are divided into two classes, signifying their importance; and a message-receiving instrument is employed at the central station to receive the signals transmitted by the multiple-signaling device; and an audible alarm is also employed at the central station, which gives notice to the attendant when a message of one class—in this instance the important class—is being received or awaits a reply. * * * At the central station a relay is included in the main-line circuit, the armature lever of which controls a local circuit, in which a message-receiving instrument, herein shown as an ordinary recorder or register, is located, the said relay responding to total interruptions of the main line caused by the multiple-signaling device. An audible alarm, herein shown as a vibrating bell, is connected in a ground circuit connected with the main line, and each substation is provided with means for closing the ground branch or terminal, to thereby cause the said vibrating bell to respond while the ground circuit is closed; the relay controlling the local circuit not being effected by the ground circuit. In another application filed by me May 5, 1886, serial No. 201,134 [which became patent '87], devices are shown for operating the multiple-signaling device as are herein shown; and a receiving instrument for recording the messages, as well as an audible alarm, was also shown, but operated by a current of different character. It is herein designed, as in the application referred to, that the patrolman shall transmit his patrol or 'on duty' signal, and also shall be able to transmit any special or want signal necessary; and that certain authorized citizens shall have access to the box or substation to transmit a signal when in need of assistance. The receiving instrument at the central station is arranged to respond to all signals, whether patrol, special, or a citizen's signal: but the audible alarm is arranged to be responsive to only the special or citizen's signal; the two last-named signals being of special importance, and demanding immediate attention, while the former need little attention. * * * At the central station a relay, R, is interposed into the main line, L, having the battery, B, the armature lever, r, of which controls a local circuit, L^1, which latter includes a recorder or register, R^1, which will respond to interruptions in the main circuit; and, as described, all signals transmitted, whether patrol, special, or citizen, cause a total interruption in the current, and are therefore duly recorded upon the receiving instrument, R^1. It is desirable, when any special or citizen's signal is transmitted, that an audible alarm be sounded to indicate the fact, calling the attention of any person at the station. To do this, a ground branch or circuit, L^3, is connected with the main line, L, having the battery, B^1, and the vibrating bell, V, while at the substation a contact pen or point, o, is connected with a ground terminal normally adjacent to but disengaged from the arm f^2, which latter is made of conducting material, so that, as the said arm f^2 is moved in one direction (and in this instance in that direction to set up any special or citizen's signal), it will make contact with the said pen or point, o, closing the ground circuit, and causing the bell, V, to respond during the time that the signal is being set up. The pen c at such time, being elevated and retained by the spring latches, f, f^1, causes the arm a^6 to engage with the cylinder, A, thus keeping the main circuit closed while the ground circuit is closed. The contact pen o, and arm f^2, and the co-operating devices constitute a circuit controller to change the condition of a current of different character from that employed by the multiple transmitter for transmitting the signals. The contact pen o is placed in such proximity to the arm f^2 that upon any movement of said arm sufficient to set up a special signal the said contact pen will be struck, it yielding to compensate for the various signals upon the cylinder, A. * * * Any other suitable transmitter may be employed at the substation to transmit the various signals than that herein described, the single

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message receiving apparatus at the central office receiving the same, while the audible alarm responds to such as have hereinbefore been termed the 'important signals.' I claim:

"(1) In a system for transmitting signals from a substation to a main station, a multiple-signaling device located at the substation for producing changes in the main circuit to transmit a message, and a circuit-controlling device, also located at the substation, and operated mechanically by the multiple-signaling device at the will of the operator for producing changes in another circuit, to transmit a warning signal; a message-receiving instrument, located at the main station, to receive the message transmitted over the main circuit by the multiple-signaling device; and an audible alarm, also located at the main station, responsive to the change in the current produced by the circuit-controlling device at the substation,—all substantially as described.

"(2) In an electric circuit, the combination, substantially as described, of the multiple-signaling device located at the substation for transmitting several different signals; a circuit-controlling device, also located at the substation, for changing the condition of a current of different character from that employed to transmit the signals; a message-receiving instrument at the central station, responsive to all signals transmitted by the multiple transmitter; and an audible alarm, also at the central station, responsive only to the circuit-controlling device at the substation." [Other claims need not be recited.]

It is contended by the appellant that this patent '86, which is first in number of the three, is the fundamental or generic patent, the other two being for special details; and that, as it is not counted on in this suit, it must be treated as outstanding against the other two, leaving them devoid of invention, or reduced to mere details. No. '86 does, it is true, deal with the same field of invention,—selective signaling,—and accomplishes the same result; but there is between this and the other two so wide a difference that it cannot contain them, nor does it overlap them. The extremely vague and obscure phrase, "change the condition of a current of different character from that employed by the multiple transmitter for transmitting the signals," becomes intelligible when the whole document is considered, the "current of different character" being the "current that flows through the ground circuit and the terminals that lead to and from it." In No. '87 all the impulses come over the one circuit to record their messages on the one register, and, by reason of their differing character, impressed with the capacity for self-selection by appropriate receivers at the place of receipt, so that some of them when there received will sound the alarm, and others not. In No. '86 the selection is made at the place of transmission, not at the place of receipt, and the impulse which is to sound the alarm is a different one from the impulse which is to deliver the message, and is itself transmitted by another and different circuit. We concur, therefore, with the court below in the conclusion that the first two claims of No. '87 cover a system such as is set forth in its description, when the self-selection is effected at the place of receipt by current changes of one or another character (normal, reduced, or interrupted for a greater or less period), produced by the operation of a circuit controller at the place of transmission. Patent '88 is an improvement upon '87. It secures selective signaling by "current changes," by a "changed condition of the circuit" of a particular variety. The transmitting apparatus is constructed to

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produce a series of short changes and a prolonged change in the current, thus limiting the invention of patent '88 to the particular way of producing changes in the current, or rather to the contrivances which secure such a way of producing changes, for the use of short and long changes, however combined, is already within the first two claims of '87, and cannot by itself be made the subject of claim in '88. The claims of patent '88 are:

"(1) In a system for transmitting signals from one station to another, a transmitting apparatus constructed and arranged to produce a series of short changes in the condition of the circuit and a prolonged change; also a series of short changes, as described; a relay responsive to such changes in the circuit, and a receiving instrument controlled by said relay; another relay, also responsive to such changes in the circuit, and means controlled by the last-named relay, for effecting the operation of an audible alarm or warning signal only upon the occurrence of the prolonged change,—substantially as described.

"(2) In a system for transmitting signals from one station to another, a transmitting apparatus constructed and arranged to transmit a series of total interruptions and a prolonged interruption, and also a series of total interruptions, as described; a relay responsive to such interruptions of the circuit, and a receiving instrument controlled by said relay; another relay, also responsive to such interruptions of the circuit; and means controlled by the armature of the last-named relay for closing a local circuit containing an audible alarm or warning signal only upon the occurrence of the prolonged interruption,—substantially as described.

"(3) In an electric circuit, a transmitting apparatus constructed and arranged to produce a series of changes of short duration in the condition of the circuit, also a series of short changes and a prolonged change combined with a receiving instrument responsive to such changes in the circuit, and an audible alarm responsive to the prolonged change only,—substantially as described.

"(4) In an electric circuit connecting two stations, circuit-controlling devices at the transmitting station for changing the condition of the current to produce impulses of the same character of short and long duration at will, combined with two receivers located at the receiving station, one of which responds to the impulses of short duration, and the other responds to the impulses of long duration only,—substantially as described.

"(5) In a municipal telegraph system, an electric circuit connecting a main and one or more substations, and a signal transmitter at each substation containing circuit-controlling devices which change the condition of the circuit for intervals of short and long duration at will, combined with a message-recording instrument at the main station, which receives the signals transmitted, and an audible alarm, also located at the main station, responsive only to the long changes produced by the circuit-controlling devices at the substations, whereby a warning signal may be sounded for some, and not for other, signals, at the will of the operator, as set forth."

The question of infringement has been argued at great length. The circuit court found the proof of infringement indefinite, but sufficient to establish a prima facie case, and put the defendant upon its denial. It introduced no evidence to disprove the facts testified to by complainant's witnesses as to the construction of the claimed infringing devices. Defendant's circulars, which referred to the Bridgeport and Cleveland plants, installed before the present complainant took title, were a sufficient threat that similar ones would be hereafter erected. A careful inspection of the proof leads us to concur with the judge who heard the cause at circuit as to infringement of patent '87. The testimony indicated that the elements of the first two claims were combined by defendant, its se-

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lective signaling being secured by "current changes of one or another character." As to patent '88, however, which, as we have seen, must be confined to much more specific structures, we do not find the testimony sufficient.

The decree of the circuit court is affirmed as to patent '87 and reversed as to patent '88, without costs to either party.

(107 Fed. 300.)

THE AGGI.

(Circuit Court of Appeals, Second Circuit. January 4, 1901.)

No. 9.

1. SHIPPING—CARGO DAMAGE—SEAWORTHINESS.

A cargo of sugar was damaged on a voyage from Java to Boston by sea water which entered around loosened bolts securing in place a wooden scroll work under the ship's figurehead, and extending some feet from the prow on either side of the vessel. These bolts extended through the ship's plates, being fastened by nuts on the inside, and were in such position that water entering through the holes would readily flow into the fore peak, where the sugar damaged was stowed. The action of the seas upon the scroll work, especially in rough weather and when the ship was heavily laden, would naturally tend to gradually loosen the nuts on such bolts. The bolts had not been inspected for two years, and there was no evidence showing whether or not the nuts were loose at the beginning of the voyage, except the testimony of the officers that there was no leakage on the previous voyage. On the voyage the ship was heavily laden and encountered some heavy weather, but not more than should have reasonably been anticipated. *Held* that, if the bolts were loose at the inception of the voyage, the ship was in that respect unseaworthy, from the consequences of which the owners were not relieved from liability by the provisions of the Harter act, and that the evidence was not sufficient to overcome the presumption of fault which arises against the carrier when goods are damaged during their transportation.

2. SAME—EXCEPTIONS IN BILLS OF LADING.

A provision of a bill of lading that the ship is not to be answerable for loss through any "latent defect in the machinery or hull not resulting from want of due diligence by the owners" does not cover a condition of unseaworthiness existing at the commencement of the voyage, but applies only to a state of unseaworthiness arising during the voyage.

Appeal from the District Court of the United States for the Eastern District of New York.

J. Parker Kirlin, for appellant.
Walter F. Taylor, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The sugar of the libelants while being transported by the steamship on a voyage from Java to Boston was injured by the inflow of sea water. The sugar was in bags, and was stowed in the main peak of the vessel. The water entered around the bolts fastening the scroll work of the figurehead on the bow of the vessel. This scroll work extended 12 or 15 feet backward from the stem on each side of the bow, was of wood varying

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in thickness from 2 to 4 inches, and was secured by a row of iron bolts which passed through it and through the iron plates of the vessel into a compartment of the main deck, adjoining the forecastle, used for the stowage of the ship's tackle. The row of bolts was somewhat above the main deck. As the vessel was laden for the voyage, the bolts were about 8 feet above the water line. Where the deck plates join the stem of the vessel they did not fit snugly, and small openings existed, which would permit the water to flow from the main deck into the fore peak. When the vessel arrived it was found that five or six of the bolts were sufficiently loose to admit the water to the main deck, and that it had flowed thence into the fore peak and damaged the bags nearest the stem, and accumulated in the bottom and damaged the lower bags.

The voyage occupied 2 months and 12 days, being protracted about a day and a half beyond the usual period by weather which the master characterized as "boisterous and contrary."

The question upon this appeal, as it was in the court below, is whether the injury to the goods was caused by a peril of the seas, or by the insufficiency of the vessel for their safe transportation. The opinion of the court below (93 Fed. 484) contains a full discussion of the evidence, and renders any further discussion of it unnecessary, as we agree generally with the conclusions reached.

The ship stowed the goods where water leaking through the bolt holes would find its way directly to the goods; and, as she was heavily laden for the voyage, the entrance of the water and ensuing damage to the goods if the bolts were loose was a probable consequence and almost inevitable if the weather was bad. It follows that if the bolts were loose at the inception of the voyage the vessel was then unseaworthy. It is contended for the vessel that they were loosened by the heavy weather upon the voyage. This contention rests upon evidence that more or less severe weather was encountered, that there had been no leakage around the bolts upon previous voyages, that the vessel was in an apparently sound and seaworthy condition when she commenced the voyage, and that she had received a general overhauling and inspection some two years before. There is no evidence of a later inspection of the bolts, and none that they received any injury upon the voyage beyond the wear and tear ordinarily incident to a voyage of that character and duration.

In the most favorable view for the appellant, the presumptions authorized by the evidence are as consistent with the conclusion that the bolts were loose at the inception of the voyage as that they were loosened by any unusual strains to which they were subsequently subjected. We conclude that the appellant has not overcome the prima facie presumption of fault which obtains when goods in the custody of a common carrier for transportation are damaged after their receipt and before their delivery.

It is unnecessary to inquire whether the owners of the vessel did or did not exercise due diligence to make the vessel seaworthy. The provisions of the Harter act do not relax the obligation of the vessel owner to supply a seaworthy vessel,—an obligation import-

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ing an absolute warranty that such is her condition at the inception of the voyage. The Carib Prince, 170 U. S. 655, 18 Sup. Ct. 753, 42 L. Ed. 1181. There are no terms relaxing this obligation in the bill of lading under which the goods were shipped. The provision that the ship is not to be answerable for loss through any "latent defect in the machinery or hull not resulting from want of due diligence by the owners" does not cover a condition of unseaworthiness existing at the commencement of the voyage, but, according to the decisions of the supreme court, applies only to a state of unseaworthiness arising during the voyage. The Caledonia, 157 U. S. 124, 15 Sup. Ct. 537, 39 L. Ed. 644.

The decree is affirmed, with interest and costs.

(105 Fed. 854.)

CORLEY v. TRAVELERS' PROTECTIVE ASS'N.

(Circuit Court of Appeals, Sixth Circuit. December 10, 1900.)

No. 805.

1. ACCIDENT INSURANCE—LAW GOVERNING CONTRACT—PLACE OF EXECUTION.

Ky. St. § 679, relating to life insurance, provides that "all policies or certificates hereafter issued to persons within the commonwealth by corporations transacting business therein under this law" which contain any reference to the application or constitution or by-laws of the corporation as part of the contract shall have attached a copy of such application or the provisions of the constitution or by-laws referred to, otherwise such provisions shall not be received in evidence or be considered as a part of the contract. An accident insurance association, having its national headquarters in another state, was composed of divisions and local posts; and one of such divisions, having subordinate posts, was located in Kentucky. Benefits were paid through the posts, which also received applications for membership and dues, and forwarded them to the division, which passed upon the eligibility of the applicant, subject to approval by the national office. Certificates were issued by the national secretary and sent to the division, through which they were received by the members. *Held*, that such association was transacting business in the state of Kentucky, within the meaning of the statute, and a certificate so issued and delivered therein to a person residing in the state was subject to its provisions.[1]

2. SAME—FOREIGN COMPANIES—DOING BUSINESS IN STATE.

Where an insurance association in fact does business in a state by soliciting members and issuing policies therein, its contracts so made are governed by the laws of the state, regardless of whether or not it applied for the privilege of doing business therein as required by the statute.

3. SAME—CHARACTER OF COMPANY—FRATERNAL OR ASSESSMENT COMPANIES.

An association having a membership of traveling men issued certificates to its members which entitled them to benefits in case of death or injury from accident; the same being paid from a fund created primarily by the membership fees and annual dues, but for which assessments were to be made if required. There was a central or national organization, with state divisions and local posts, although members were received through the divisions where there was no post. The benefit or indemnity feature seemed to be the principal purpose of the association, and the annual dues were divided between the post, if any, the division, the

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[1] See note at end of case.

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central association, and the indemnity fund. *Held*, that such association was not a secret or fraternal organization under the supervision of a grand or supreme body, and whose members were received "through the lodge system exclusively," within the meaning of Ky. St. § 641, but was an insurance organization on the co-operative or assessment plan, as defined in sections 664, 665, and subject to the provisions applicable to such associations.

4. SAME—KENTUCKY STATUTE—SPECIAL LIMITATION OF ACTION.
Under the provision of Ky. St. § 679, requiring all policies or certificates issued to persons within the state by any corporation transacting business therein to have attached thereto a copy of any provision of the constitution or by-laws of the corporation referred to therein, or which is made a part of the contract, where such a corporation issued a certificate to a member which entitled him "to all the benefits accruing from such membership under the provisions of the constitution and by-laws of their association, * * * which are made a part of this certificate," the benefits in case of the death of the member to be paid to a beneficiary named, but no copy of any part of the constitution or by-laws was attached, the association cannot plead in bar of an action by the beneficiary after the death of the member a special limitation of six months contained in the constitution, but which was not shown by the certificate.

5. SAME—EFFECT OF FAILURE TO COMPLY WITH STATUTE.
In such case, however, the constitution may be looked to for the purpose of ascertaining the amount of the benefits recoverable, since the provision fixing such amount adds no new element to the contract, and the association will not be permitted to avoid the contract by its own wrong, in failing to comply with the statute.

6. SAME—DEATH FROM ACCIDENT—KILLING BY INSANE PERSON.
A provision of a policy insuring against death by accident, exempting the company from liability for death from "intentional" injury inflicted by the insured or any other person, does not preclude a recovery where the insured was killed by an insane person, incapable of forming a rational intent.[2]

In Error to the Circuit Court of the United States for the District of Kentucky.

This action was brought to recover upon a certain certificate of membership issued by the Travelers' Protective Association of America, a corporation of the state of Missouri. The certificate was issued to J. W. Corley, dated October 8, 1894. Corley was shot and killed on June 24, 1897. Proofs of death were furnished in July, and in August of the same year the defendant company declined to pay the claim. This action was brought in the circuit court on the 10th day of June, 1898. The certificate is as follows:

"By this certificate of membership certifies that J. W. Corley, of Louisville, Ky., is a member of the Travelers' Protective Association of America, and is entitled to all the benefits accruing from such membership, under the provisions of the constitution and by-laws of this association, subject to the conditions printed on the back hereof, and the application for membership, all of which are made a part of this certificate. Benefits, in case of death, payable to Miss Sallie H. Corley, his adopted daughter. In witness whereof, this association has caused this certificate to be signed by its president and secretary, under the seal of the association, at St. Louis, Mo., this eighth day of October, A. D. 1894."

Rules.

"The member hereby agrees that the following rules shall be observed: That the Travelers' Protective Association of America shall not be liable for injuries incurred by a member in occupations more hazardous than specified in his application for membership; or in case of injuries, fatal or otherwise, wantonly or intentionally inflicted upon himself while sane or insane; or

[2] Risks covered by accident policy, see note to Society v. Dolph, 38 C. C. A. 3.

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in case of disappearance, or injuries of which there is no visible mark upon the body (the body itself not being deemed such a mark in case of death); or in case of injury, disability, or death happening to the member while intoxicated, or in consequence of his having been under the influence of any narcotic or intoxicant; or death or disability when caused wholly or in part by any bodily or mental infirmity or disease, dueling, fighting, wrestling, war, or riot; injury resulting from an altercation or quarrel, unnecessary lifting, voluntary overexertion (unless in a humane effort to save human life), voluntary or unnecessary exposure to danger or to obvious risk of danger, or by intentional injuries inflicted by the member or any other person; injury received while avoiding or resisting arrest, while violating the law or violating the ordinary rules of safety of transportation companies, or riding on a locomotive; or to cases of injury caused by the disease of epilepsy, paralysis, apoplexy, sunstroke, freezing, orchitis, hernia, fits, lumbago, vertigo, or by sleepwalking, voluntary inhalation of any gas or vapor; injury, fatal or otherwise, resulting from any poison or infection, or from anything accidentally or otherwise taken, administered, absorbed, or inhaled; disease, death, or disability resulting from surgical treatment (operation made necessary by the particular injury for which claim is made, and occurring within three calendar months from the date of accident excepted). Any advisory surgeon, physician, or other authorized representative of this association shall be allowed to examine the person or body of an injured member as often as may be necessary, in regard to any alleged injury or cause of death, and a refusal to allow such examination shall forfeit any and all claims under this certificate. Beneficiaries can be changed only on application to the secretary at St. Louis. Any member meeting with an accident must notify the state secretary of the division of which he is a member, and the national secretary, immediately, of said accident, giving full particulars of same, and name of attending physician. In case of failure to so notify, except because of unconsciousness or physical inability, the member shall forfeit all right to insurance benefits."

The application for membership is in the form following:

"Any white male person of good moral character, not under the age of eighteen years or over 60 years, engaged as a commercial traveler, as buyer or seller for wholesale or commission house or manufacturer, or any wholesale dealer, importer, commission merchant, or manufacturer, is eligible to membership in this association.

"Instructions to Applicants.

"When desirous of dividing the amount due your beneficiary, you must do so in fractions, viz. one-fifth, one-fourth, etc., as you desire. The beneficiary's Christian name must be given in all cases, and the beneficiary must be a member of the family of the applicant. Applications must be accompanied with five dollars, which pays the semiannual dues. The annual dues are ten dollars, payable either annually or semiannually, in advance, on July 1st and January 1st, as the applicant may direct, one dollar of which goes to the state division, one dollar to the post (where there is no post, two dollars to the state division), two dollars to expense fund, and six dollars to benefit fund.

"Objects.

"(1) To secure the repeal of all municipal, county, state, or territorial laws imposing or enforcing a license tax on commercial travelers. (2) To secure recognition from railroads, and obtain as favorable terms on transportation and baggage as are given to any other class of travelers, and to adjust all differences between railroads and commercial travelers on a fair, equitable basis. (3) To secure hotel accommodations commensurate with price paid. (4) To elevate the social and moral character of commercial travelers as a profession, and to bring about the better acquaintance of members. (5) To provide a benefit fund in case of death by accident or injury by accident. (6) To secure business connections for unemployed members.

"I, ———, being desirous of becoming a member of the Travelers' Protective Association of America, inclose herewith a membership fee of five dollars, and do warrant the following statements to be true: I do hereby certify

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that I am engaged in the capacity of a commercial traveler, salesman, or buyer, wholesale dealer, importer, commission merchant, or manufacturer, engaged in a legitimate commission, wholesale, or manufacturing business, and that I will comply with all the requirements of the constitution and by-laws of said association, and the terms of the certificate of membership to be issued to me, and that I have answered all questions asked in this application truthfully and to the best of my knowledge and belief, and I hereby agree that any misstatement or concealment of any facts will cause a forfeiture of membership in said association, and that this application is a part of my certificate with the Travelers' Protective Association of America; and I hereby expressly waive any and all provisions of law now existing, or that may hereafter exist, preventing any examining or attending physician from disclosing any information acquired while acting in a professional capacity or otherwise, or rendering him incompetent to testify as a witness in any way whatever.

"Benefits.

"Five thousand dollars in case of death by accident. Twenty-five dollars weekly indemnity, not to exceed fifty-two weeks, in case of accident. Two thousand five hundred dollars, loss of both legs or arms. Two thousand five hundred dollars, loss of one arm and one leg. One thousand dollars, loss of one hand or one foot. Five thousand dollars, loss of both eyes. One thousand dollars, loss of one eye.

"(1) My full name is J. W. Corley. (2) My age is 52. My height is 5 feet 7½. My weight is 165. (3) My address for mail, 635 W. Main. (4) Name of firm, Steng & Thalheimer. Business, boots and shoes. (5) Location of firm, Louisville, Ky. (6) My occupation is salesman. (7) The duties of same are salesman. (8) In case of death the benefits of my certificate shall be payable to: (a) Give individual name in full: Miss Sallie H. Corley. (b) Residence, 635 W. Main street. (c) Relationship, if any, adopted daughter. (9) What state division do you wish to be placed in? Kentucky. What post? D. (10) Are you now, or have you ever been, a member of any other state division of this association? No. (11) Have you ever had, or are you now subject to, fits or any disorders of the brain, or any mental or physical infirmities, which would thereby render you liable to personal injuries? No. (12) Do you drink wine, spirituous, or malt liquors to excess? No. (13) Do you understand that in case of accidental injuries, or death resulting from intoxication, you or your beneficiary will receive no benefits? Yes.

"This is to certify that I have carefully read the application herewith presented, and have answered all the questions herein contained truthfully, to the best of my knowledge and belief."

The association was composed of certain divisions and posts, there being a division known as the "Kentucky Division," which had a post known as "Post D," located at Louisville, Ky. This post has a president, vice president, secretary and treasurer, and board of directors. The applications of a number of persons were made at the same time as that of Corley, and the amount of money required for the dues was forwarded to the state board of directors, who pass upon the eligibility of a member. The applications were then forwarded to St. Louis, the national headquarters of the organization, where the members, including Corley, were accepted. The money which was required to accompany the application was paid to the post secretary, who forwarded it to the state secretary, who in turn forwarded it to the national secretary. Upon the election of the applicant, the national secretary notifies the secretary of the division. The national secretary issues the certificate of membership, which is forwarded through the secretary of the division to which the member belongs. Corley had paid his dues up until the time of his death, and was not in default. The testimony tended to show that Corley was killed by an insane person, incapable of forming intent to take life at the time of the shooting. The constitution contains a provision that "no action against this association for the recovery of any claims arising under the certificate of membership, or the constitution and by-laws, shall be sustained unless commenced within six months after the refusal

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of the association to pay the same, and the lapse of such period shall be conclusive evidence against the validity of any claim asserted if an action for its enforcement be subsequently commenced." This limitation was relied upon by the company. For the plaintiff, it was claimed it could have no effect, because of the Kentucky statute cited in the opinion.

W. W. Thum, for plaintiff in error.

Clarence Dallam, for defendant in error.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

DAY, Circuit Judge, after stating the foregoing facts, delivered the opinion of the court.

The learned judge who tried this case directed the jury to return a verdict in favor of the association, being of the opinion that the contract of insurance was made in Missouri, and therefore not controlled by the Kentucky statute, and consequently the action was barred by the contract of limitation of the action entered into by the association and member, because of failure to bring the suit within six months after the claim was rejected. The Kentucky Statutes (section 679) provide:

"All policies or certificates hereafter issued to persons within the commonwealth by corporations transacting business therein under this law, which policies or certificates contain any reference to the application of the insured, or the constitution, by-laws or other rules of the corporation, either as forming part of the policy or contract between the parties thereto or having any bearing on said contract, shall contain or have attached to said policy or certificate a correct copy of the application as signed by the applicant, and the portions of the constitution, by-laws or other rules referred to; and unless so attached and accompanying the policy, no such application, constitution, by-laws or other rules shall be received as evidence in any controversy between the parties to or interested in said policy or certificate, and shall not be considered a part of the policy or of the contract between such parties. The said policy or certificate, application, constitution, by-laws or other rules shall be plainly printed, and no portion thereof shall be in type smaller than brevier: provided, however, that nothing in this section shall be construed as applying to health certificates or constitutional receipts, or other evidences used in reinstatement of a policy or certificate."

The purpose of this statute is apparent, and requires that the portions of the constitution and by-laws or rules of the association which are to form part of the policy or contract between the parties, or to have any bearing upon the same, shall be plainly printed and attached to the certificate. It has become so common as to have occasioned judicial comment in more than one instance, that parties obtaining insurance may be misled from the failure to read the many conditions and stipulations inserted in fine-print clauses of policies or embodied in the provisions of lengthy constitutions. This statute is designed to place the conditions upon which the policy is issued in plain and direct form upon the certificate or policy, in order that the policy holder or member may become acquainted with the provisions of his contract, and leave no room to claim that he has made any other or different contract. The present case is a good illustration of the fairness and wisdom of such a course. Upon the face of the certificate issued to a member, it is apparent that the constitution and by-laws contain a statement of the measure of obligation undertaken by the company to the assured; yet this con-

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stitution is not set forth, and there is nothing upon the certificate to indicate to the member the short period of limitation within which an action must be brought. The beneficiary, finding a certificate among the effects of the deceased person, but not discovering the constitution, may have no notice of this short period of limitation, and be led to rely upon the general law of the state, which in the present case, we are advised, is five years from the time the cause of action accrued. The purpose and meaning of the statute are plain. Does it apply to this case? The statute, in terms, seeks to regulate certificates issued to persons within the commonwealth of Kentucky by corporations transacting business therein. The right of a state to determine upon what terms it will permit foreign corporations to do business within its borders is too well established to need comment. Repeated adjudications of the supreme court of the United States have established the doctrine that foreign corporations do business in a state as a matter of grace, and not of right, and the state may prescribe such rules as it may see fit to regulate the privilege granted, and to protect its citizens from the abuse of corporate powers. Insurance Co. v. Daggs, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552; Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 20 Sup. Ct. 518, 44 L. Ed. 657; Hooper v. California, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297; Society v. Clements, 140 U. S. 226, 11 Sup. Ct. 822, 35 L. Ed. 497; Insurance Co. v. Cravens, 178 U. S. 389, 20 Sup. Ct. 962, 44 L. Ed. 1116.

The learned judge, in granting the prayer for peremptory instruction in favor of the association, made the case turn upon the consideration that the certificate of membership was issued in the state of Missouri. We do not think this proposition necessarily determines the case, although in this connection it may be remarked the certificate was forwarded through the office of the company in Kentucky, first to the state division, and thence reaching Corley. The certificate was within the control of the company's agents until delivered to Corley. This statute, in using the terms "certificate issued," refers to the well-known practice of such companies to grant certificates of membership which shall entitle the recipient to the benefits of the insurance. In analogy in this respect to policies of insurance, the certificate purports to be a contract of insurance, giving the "benefits" in case of death to the beneficiary. The true test, in our judgment, is whether the obtaining of this membership—the issuing of this certificate—was transacting business within the commonwealth of Kentucky with persons therein. An examination of the facts shows that all the essential business in obtaining the memberships was transacted in Kentucky. In that state the association had established a division. There it received applications and enrolled members, and passed upon their eligibility before forwarding the application to the home office. The local post of which Corley was a member was organized and had its habitation at Louisville, Ky. There the dues of members were paid, benefits were dispensed, and, except the forwarding of the applications and money to the home office for its action, all the essential features of the business were transacted. In the light of this proof, we cannot

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doubt that, within the meaning of this statute, this corporation was transacting business and issuing certificates to persons within the commonwealth of Kentucky. If it were not so, the company may have all the benefits of collecting dues, organizing divisions and posts, holding meetings, and otherwise carrying on its business, and avoid the force of statutes passed to regulate business of such character in Kentucky, by simply maintaining its home office at its place of organization, and there finally passing upon applications for membership. We think this statute was passed with a view to bringing within its terms and subjecting to its provisions corporations which might avail themselves of the right to transact such business in the state. It is urged that there is no proof that the association had ever applied for the privilege of doing business under this statute, or was acting thereunder. This can make no difference, if by the terms of the law the company came within its provisions. The fact that it saw fit to transact business within the state required it to comply with the laws thereof, and, having had the benefit of such business and received the money of the assured in that state, it is deemed to have submitted to the jurisdiction thereof. Berry v. Indemnity Co. (C. C.) 46 Fed. 439. It is further urged that this statute had no application, because the association is not of the character which the law undertakes to regulate. Section 641, Ky. St., provides:

"The words 'insurance company or insurance corporation,' as used in this article, shall be held to mean and include any association, individual, company or corporation, partnership or joint stock company engaged in or carrying on, in any manner, the business of insurance in this state, except that the provision of this chapter or article shall not apply to secret or fraternal societies, lodges or councils, which are under the supervision of a grand or supreme body, and secure members through the lodge system exclusively, and pay no commission nor employ any agents, except in the organization of and supervision of the work of local subordinate lodges or councils."

Section 664 provides:

"Any corporation, association or society which issues any certificate, policy or other evidence of interest to, or makes any promise or agreement with its members, whereby, upon the decease of a member, any money or other benefit, charity, relief or aid is to be paid, provided or rendered by such corporation, association or society, to the legal representative of such member, or to the beneficiary designated by such member, which money, benefit, charity, relief or aid is derived from voluntary donations or from admission fees, dues and assessments, or any of them, collected or to be collected from the members thereof, or members of a class therein, and interest and accretions thereon, or rebates from amounts payable to the beneficiaries or heirs, and wherein the paying, providing or rendering of such money or other benefit, charity, relief or aid is conditioned upon the same being realized in the manner aforesaid, and wherein the money or other benefit, charity, relief or aid is applied to the uses and purposes of such corporation, association or society, and the expenses of the management and prosecution of its business shall be deemed to be engaged in the business of life insurance upon the co-operative or assessment plan, and shall be subject only to the provisions of this subdivision."

Also section 665:

"Any corporation, association or society which issues any certificate, policy or other evidence of interest to, or makes any promise or agreement with its members, whereby, upon the sickness or other physical disability of a mem-

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ber, and not by reason of having attained a certain age, any money or other benefit, charity, relief or aid is to be paid, provided or rendered by such corporation, association or society, to such member or beneficiary designated by him, which money, benefit, charity, relief or aid is derived from voluntary donations or from admission fees, dues, assessments, or any of them, collected or to be collected, from the members thereof, or members of a class therein, and interest and accretions thereon, and wherein the paying, rendering or providing of such money, or other benefit, charity, relief or aid is conditioned upon the same being realized in the manner aforesaid, and wherein the money or other benefit, charity, relief or aid is applied to the uses and purposes of such corporation, association or society, and the expenses of the management and prosecution of its business, shall be deemed to be engaged in the business of casualty insurance upon the co-operative or assessment plan, and shall be subject only to the provisions of this subdivision."

The constitution of the association was put in evidence, afterwards excluded by the court, and was not formally offered, except the sections regarding the amount of the recovery and the limitation of the action. However, the defendant attaches to its answer as an exhibit a copy of the constitution, which, it appears, was compiled several years after the issuing of the certificate, but there is no suggestion that it is not the constitution in force at the time of the issuing of the certificate in question; and when thus introduced into the record by the association, although the reply makes the issue that it is not a true copy of the constitution, we may look to it, so far as the association is concerned, with a view to determining the character of the organization, and we find that the annual dues of the association are $10, apportioned $1 to the post, $1 to the state division,—where there is no post, $2 to the state division,—$6 to the general indemnity fund, and $2 for general expenses. Section 1, art. 6. Further:

"Whenever the indemnity or benefit fund is reduced by the payment of indemnity claims to less than $5,000, the board of directors may order an assessment, not to exceed two dollars, upon each member of the association, a notice of said assessment to be mailed to each member by the national secretary; and all members failing to pay said assessment within thirty days shall cease to be members of this association." Section 3, art. 6.

Article 9 provides:

"Section 1. The indemnity or benefit fund shall be established and maintained out of the annual dues, as prescribed in section 1 of article 6, and the membership fee, as prescribed in section 2 of article 2."

We think the association comes within the provisions of the Kentucky statute just cited; for, while it has among its purposes the promotion of acquaintance and friendship among traveling men, and to obtain for them better railroad rates and hotel accommodations, it may be said to be its principal purpose to provide a benefit fund for members in case of death or accident. This fund is derived from dues, and when depleted is replaced by assessment upon members. The certificate of membership provides for payment of a specific sum for death by accident. Provisions are made for enforcing and collecting the payment of dues. We think this association comes under the Kentucky statute, unless it is within the exception embodied in section 641 of the statutes. We find nothing in the organization of a secret or fraternal character. We do not find the supervision of a grand or supreme body and members se-

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cured by the lodge system exclusively. Not all commercial travelers may become members entitled to the benefits of the insurance. An application is required, setting forth the willingness of each applicant to submit to a physical examination, and waiving all provisions of law now existing or that may hereafter exist preventing any examining or attending physician from disclosing any information acquired while acting in a professional capacity or otherwise, or rendering him incompetent to testify as a witness in any way whatever. The "benefits" are stated at a fixed amount in case of death, and certain specific sums for various injuries. It is evident that persons not answering these questions satisfactorily, though otherwise eligible, would be rejected as members. We do not discover in this association the features which characterize associations which the statute exempts from its provisions. We are strengthened in this conclusion by a letter from the superintendent of the insurance department of Missouri, which seems to have been admitted without objection, wherein it is declared:

"After an examination of the constitution and by-laws of the Travelers' Protective Association of America, forwarded by you to this department, I beg leave to inform you that the association not only fails to meet the requirements of the law governing this class of organizations, in reference to having a lodge system with ritualistic form of work," etc.

We concur in the view herein expressed that the association has no lodge system, with ritualistic form of work, and, we may add, no lodge system by means of which members are exclusively secured. In order to exempt it from the requirements of the Kentucky statute above quoted, it must secure its members through that system exclusively. We are, therefore, of opinion that this association was one coming within the purview of the Kentucky statute, and was transacting business when it obtained members and issued certificates to persons within that commonwealth. The provision of the constitution relied on was therefore required to be printed upon or attached to the certificate, and for failure to comply with the law in this respect the limitation is not a defense.

It is urged that this construction will prevent the plaintiff from recovery under this certificate, as the constitution must be looked to in order to make out a recovery of any amount, and no part of it is printed upon the certificate. But we find that the certificate undertakes that the "benefits," in case of death, shall be payable to the beneficiary. It does not introduce any new element of contract between the parties to ascertain the amount of this benefit from the constitution. The purpose of this statute is to require the company, in its policy or certificate, to bring all of the provisions of the contract to the attention of the insured, and definitely fix the conditions of the insurance beyond the power of others to change or enlarge the contract after his decease. To escape payment because the certificate did not comply with the statute, by failing to print the provisions fixing the amount to be recovered in case of death, would be permitting the company to avoid the contract by its own wrong in failing to comply with the statute.

It is urged further by defendant in error that it was correct to

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instruct the jury for the defendant, because it appears that, Corley having been killed by a gunshot wound inflicted by another, his death was not accidental, and that the company was not liable for death by intentional injury. We think it is the true rule that if the deceased was killed by one incapable of distinguishing between right and wrong, or forming a rational intent to do the act, then the death would not be intentional, any more than it would be if it happened through some unforeseen accident. There is testimony in the record tending to show that the slayer of Corley was insane at the time of the act, sufficient to carry the question to the jury.

It is also urged that the beneficiary was not adopted in accordance with the laws of Kentucky, and therefore had no insurable interest in the life of the assured. The record of adoption, it is said, does not disclose that the wife of Corley, then living, joined in the application for adoption. We think, however, for the purposes of this case, the adoption is sufficiently shown, and against collateral attack it will be presumed that the statute of Kentucky was complied with; there being nothing in the record to exclude this conclusion.

We think, therefore, that the case should have been submitted to the jury upon the issue of intentional killing, and that the court erred in holding the case barred by the six-months limitation contained in the constitution. The judgment is reversed, and the cause is remanded for further proceedings in accordance herewith.

NOTE.

What Law Governs Insurance Policies.

1. Validity.

[a] Where the contract of insurance is made and the policies issued in another state, it cannot be objected that the company has not complied with the laws relating to foreign insurance companies doing business within the state where suit is brought.

—(U. S. C. C., Ark., 1890) Marine Ins. Co. v. St. Louis, I. M. & S. Ry. Co., 41 Fed. 643:

(Mass. Sup. 1899) Commonwealth Mut. Fire Ins. Co. v. Fairbanks Canning Co., 53 N. E. 373;

(N. J. Sup. 1874) Insurance Co. v. Kinyon, 37 N. J. Law, 33.

[b] (U. S. C. C., Or., 1880) A policy issued from the office of plaintiff in Milwaukee, Wis., upon the life of M. E. in Portland, Or., and afterwards sent to the local agent there for delivery, contained a clause to the effect that the policy was not binding upon the company until countersigned and delivered there and premium paid accordingly. *Held*, that the contract was completed in Oregon, that its validity must be determined by the laws of Oregon, and that, plaintiff being prohibited from doing business in Oregon, the contract was void.—Insurance Co. v. Elliott, 5 Fed. 225.

[c] (U. S. D. C., Ind., 1876) Where an application for insurance on certain property, and a note and sum of money that constituted the premiums, were sent from Indiana by an agent of the company to the home office in Illinois, and were examined and accepted by the proper officer, *held*, that the contract was made in Illinois, and must be governed by its laws.—Lamb v. Bowser, Fed. Cas. No. 8,008 [7 Biss. 315].

[d] (Ill. Sup. 1895) An Illinois insurance company, which delivers in Illinois to a citizen of Wisconsin a policy insuring property in the latter state, is subject, in a suit on such policy, to the laws of Wisconsin as to service of summons on insurance companies.—Insurance Co. v. Thompson, 40 N. E. 488, 155 Ill. 204, 46 Am. St. Rep. 335, affirming (1894) 51 Ill. App. 339.

[e] (Ky. App. 1867) Where notes sued on were given for premiums for in-

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surance, and a contract was made through an agent in Indiana, the lex loci must determine their legal validity and effect, and therefore, if under the laws of Indiana the policy of insurance is void, the notes cannot be enforced. —Archer v. Insurance Co., 2 Bush, 226.

[f] (La. Sup. 1894) Where an open policy of insurance on shipment of goods contains all the conditions which govern the shipment, and the company reserves the right to accept or reject the risk on each shipment, the contract must be considered as made at the domicile of the company issuing the policy, within Acts 1890, No. 150, § 7, prohibiting foreign insurance companies from doing business in the state without a license.—State v. Williams, 15 South. 290, 46 La. Ann. 922.

[g] (Mich. Sup. 1892) The fact that an application for life insurance is made in Michigan does not render the contract a Michigan contract, where it appears in the by-laws indorsed upon the policy that the application was to be of no force until approved at the principal office situated in another state, and in the application furnished the assured that the contract should be considered as entered into in such other state and governed by the laws of such state.—Voorheis v. Society, 51 N. W. 1109, 91 Mich. 469.

[h] (Mo. Sup. 1899) Premiums on insurance policies in favor of a corporation in Missouri were paid in the first instance by the president of the corporation, in Chicago, to a company organized in the state of Illinois, but were ultimately paid by the corporation in Missouri. The insurance company had in no manner complied with the laws of Missouri authorizing foreign corporations to do business in the state. *Held*, that the contract of insurance was entered into in the state of Illinois, and was not affected by the laws of Missouri.—Lumberman's Mut. Ins. Co. v. Kansas City, Ft. S. & M. R. Co., 50 S. W. 281, 149 Mo. 165.

[i] (N. H. Sup. 1892) A resident of Massachusetts applied by mail, through a broker in Indiana, to the insurer in New Hampshire, for insurance on property situated in Massachusetts. Insurer issued in its business two forms of policies,—one, the standard policy required by the law of New Hampshire, on property situated in New Hampshire; the other, on property situated out of the state, which contained provisions prohibited by the laws of New Hampshire. The policy accepted by insured was of the latter kind. *Held*, that the intention of the parties was to contract in regard to the laws of Massachusetts, and therefore provisions in the policy prohibited by the laws of New Hampshire were not invalid.—Davis v. Insurance Co., 34 Atl. 464, 67 N. H. 218.

[j] (N. J. Sup. 1878) An application for insurance on property in New Jersey was made in that state to the agent in Pennsylvania, it being agreed that a policy should be issued when the application was approved. Upon receipt of the application at the company's office in Pennsylvania, it was approved, and a policy mailed to insured. *Held*, that the contract of insurance was a Pennsylvania contract, and enforceable in New Jersey, though the agent had not complied with the laws of the latter state relating to foreign insurance companies.—Insurance Co. v. Tuttle, 40 N. J. Law, 476.

[k] (N. Y. App. 1855) The agent in Canada of an insurance company incorporated in New York received and forwarded to the secretary of the company in New York a proposal for insurance on property in Canada, the proposal was accepted, and a premium note left with the secretary, who issued the policy and sent it to the agent in Canada, by whom it was delivered to the insured. *Held*, that the contract of insurance was a New York contract. —Western v. Insurance Co., 12 N. Y. 258.

[l] (N. Y. Super. 1853) A wager policy of life insurance made by a company incorporated in another state, being valid at common law, will be presumed to be valid in that state, though it is invalid by the laws of the state where it is in suit.—St. John v. Insurance Co., 9 N. Y. Super. Ct. 419.

[m] (Pa. Com. Pl. 1894) A wagering life policy cannot be enforced in Pennsylvania, though valid in the insurer's state, nor can the premiums paid thereon be recovered.—McDermott v. Insurance Co., 7 Kulp, 246.

[n] (Vt. Sup. 1899) A fire insurance agent representing several companies informed an applicant that he could only place his insurance in a company which was not authorized to do business in the state, and in procuring the

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policy he would have to act as the agent of the applicant. The applicant signed an application, which the agent forwarded to the home office in Massachusetts, where it was accepted, and a policy issued, and mailed to the agent, with a request that he collect the premium. *Held*, that the policy was a Massachusetts contract, governed by the laws of that state, and was valid under V. S. §§ 4181, 4182, prohibiting foreign insurance companies from doing business in Vermont unless authorized by the insurance commissioners, except that residents of Vermont may procure insurance at the home office of foreign companies not authorized to do business in the state.—Baker v. Spaulding, 42 Atl. 982.

[o] (Wis. Sup. 1895) Brokers domiciled in Illinois solicited fire insurance from defendant, a Wisconsin corporation, which consented to take insurance on certain Iowa property in acceptable companies, whereupon the brokers requested plaintiff, by letter addressed to its home office in Wisconsin, to write a portion of the insurance. Plaintiff sent to the brokers a blank application and a blank premium note and a policy dated in Wisconsin, which recited that the application was a part of the policy, and was on file at its office, and the brokers sent the papers to defendant's office in Missouri. Defendant filled out the application and note and returned them to the brokers, who sent them to plaintiff. *Held*, that the contract of insurance was executed in Wisconsin.—Seamans v. Knapp, Stout & Co. Company, 61 N. W. 757, 89 Wis. 171, 27 L. R. A. 362, 46 Am. St. Rep. 825.

[p] (Wis. Sup. 1895) An insurance company may, within the state of its domicile, make valid contracts of insurance against fire on property situated in a sister state, without regard to the laws of the latter state.—Seamans v. Knapp, Stout & Co. Company, 61 N. W. 757, 89 Wis. 171, 27 L. R. A. 362, 46 Am. St. Rep. 825.

2. Construction.

[a] (Wash. Sup. 1894) A life insurance policy, issued in Pennsylvania, which contains a stipulation that it "is a contract made and to be executed in the state of New York, and shall be construed only according to the laws" of that state, will be construed as though actually executed and delivered in New York.—Griesemer v. Insurance Co., 38 Pac. 1031, 10 Wash. 202; Id., 38 Pac. 1034, 10 Wash. 211.

[b] (U. S. Sup., Pa., 1897) A contract of marine insurance made by an English company, in this country, upon a cargo to be exported to Portugal, which specially provides that in case of loss the amount of damages are to be paid at the office of the company in London, the adjustment to be made according to the usages of Lloyds, being a contract to be performed in England, is governed by the English law.—London Assurance v. Companhia de Moagens do Barreiro, 17 Sup. Ct. 785, 167 U. S. 149, 42 L. Ed. 113.

[c] (U. S. C. C. A., Cal., 1898) Where a policy issued by an English corporation provides that all claims under it are to be established according to the customs of the English Lloyds, the words of an average clause contained therein are to be understood in the sense given to them by the English law. —Canton Ins. Office v. Woodside, 33 C. C. A. 63, 90 Fed. 301, modifying (D. C. 1897) 84 Fed. 283.

[d] (U. S. C. C. A., Tenn., 1896) A life insurance policy, issued upon an application which is made part thereof, and which expressly provides that the place of the contract shall be the city of Philadelphia, in Pennsylvania, is to be governed by the laws of Pennsylvania, though the insured was a resident of Tennessee at the time of making the application.—Pennsylvania Mut. Life Ins. Co. v. Mechanics' Sav. Bank & Trust Co., 19 C. C. A. 286, 72 Fed. 413, 37 U. S. App. 692, 38 L. R. A. 33, 70.

[e] (U. S. C. C., Iowa, 1893) Where an application for insurance is made in one state by a citizen thereof, through agents located therein, to a company of another state, and the policy, though actually issued in such other state, took effect on payment of the first premium, and the policy is delivered and premium paid in the state where the application is made, the law of that state governs, and interprets the force of the contract.—Insurance Co. v. Robinson, 54 Fed. 580.

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[f] (U. S. C. C., Mo., 1891) A life insurance company chartered in the state of Illinois carried on its business in the state of Missouri through agents. The agent in Missouri would solicit applications for insurance, which he would forward to the company at Chicago. When an application was approved, a policy was filled up, dated, and signed by the officers of the company at Chicago. and transmitted by mail to the agent of the company in Missouri, who, upon the payment to him by the applicant of the first premium, called in this case an "entrance fee," delivered the policy to the assured. *Held*, that the company was "doing business" in the state of Missouri within the meaning of Rev. St. Mo. § 5982, and the policy was a Missouri, and not an Illinois, contract, and that the validity and legal effect of its stipulations must be determined by the laws of Missouri.—Berry v. Indemnity Co., 46 Fed. 439.

[g] (Ala. Sup. 1875) A covenant in a life policy issued by a New York corporation, and to take effect on being countersigned by the agent in Alabama, to pay a certain sum to the children of insured in conformity to the statutes in such case made, is governed by the law of Alabama as to what persons come within the designation of "children."—Insurance Co. v. Webb, 54 Ala. 688.

[h] (Ark. Sup. 1895) Where the soliciting agent for a foreign insurance company has no authority to pass upon applications nor to issue policies, and the policies, when issued, are not sent to him for delivery, and the premiums paid are forwarded directly to the home office, the contracts of insurance are contracts of the state in which the home office is located.—State Mut. Fire Ins. Ass'n v. Brinkley Stave & Heading Co., 31 S. W. 157, 61 Ark. 1, 29 L. R. A. 712.

[i] (Iowa Sup. 1892) The secretary of defendant, an Iowa insurance company, not authorized to do business in Nebraska, while there solicited the insurance of plaintiff, a resident thereof, whereupon an application and premium notes were signed, payable at C., Iowa, the home office, from which place a policy was thereafter issued, payable in Iowa. *Held*, that the contract of insurance was made and completed in Iowa, and must be construed by its laws.—Marden v. Insurance Co., 52 N. W. 509, 85 Iowa, 584, 39 Am. St. Rep. 316.

[j] (Md. App. 1889) The fact that a policy given in Maryland is made by its terms a New York contract does not require the court of Maryland, when called upon for construction, to look to New York for authority.—Supreme Council v. Green, 17 Atl. 1048, 71 Md. 263, distinguished in Robinson v. Hurst (1893) 26 Atl. 956, 78 Md. 59, 44 Am. St. Rep. 266.

[k] (Mass. Sup. 1853) An insurance contract made with a New York company, dated and signed by the president and secretary in New York, and before taking effect as a contract from its countersignature delivered by the agent in Massachusetts, is to be interpreted by the Massachusetts law.—Daniels v. Insurance Co., 12 Cush. 416, 59 Am. Dec. 192.

[l] (Mass. Sup. 1857) A policy of insurance from a company established in another state, signed by their president and secretary there, but not to be valid until countersigned by their agent here, and issued by such agent, is to be interpreted by the laws of Massachusetts.—Heebner v. Insurance Co., 10 Gray, 131, 69 Am. Dec. 308.

[m] (Mass. Sup. 1895) A contract of fire insurance is to be construed with reference to the laws of the state in which the property is situated and the policy is issued.—King Brick-Mfg. Co. v. Phœnix Ins. Co., 41 N. E. 277, 164 Mass. 291.

[n] (Neb. Sup. 1900) A fire policy, providing that it should not be effective until countersigned by the appellant's agent in Nebraska, and actually delivered to the insured by the agent in Nebraska, is a Nebraska contract, and hence subject to construction under the laws of that state.—Antes v. Insurance Co., 84 N. W. 412.

[o] (N. Y. App. 1861) Plaintiff and defendant's agent negotiated a contract for life insurance in Georgia. Defendant was a New Jersey corporation, and the policy was dated at its principal office in New Jersey; and the court, in a suit in New York, presumed that the contract was to be performed

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in New Jersey, and therefore to be construed by the laws of that state.—Ruse v. Insurance Co., 23 N. Y. 516.

[p] (N. Y. Super. 1853) The legal construction and effect of a policy made by a company incorporated in another state are governed by the laws of that state.—St. John v. Insurance Co., 9 N. Y. Super. Ct. 419.

[q] (N. C. Sup. 1898) Under Laws 1893, c. 299, § 6, providing that "the standard fire insurance policy, as prescribed and set out in section 121 of the insurance laws of New York, shall be exclusively used in this state by all fire insurance companies from and after the first day of May, 1893"; and section 8, providing that "all contracts of insurance, the application for which is taken within this state, shall be deemed to have been made within this state, and subject to the laws thereof,"—policies of insurance, when the applications therefor are taken within this state, are to be construed in accordance with the laws and decisions thereof.—Horton v. Insurance Co., 29 S. E. 944, 122 N. C. 498, 65 Am. St. Rep. 717.

[r] (Tex. Sup. 1900) The fact that the laws of Texas require foreign insurance corporations, as a condition precedent to their doing business in that state, to establish an office, and appoint an agent upon whom service of process can be made, does not, where the principal and premiums are made payable in another state, operate to make the contract performable in, and its legal effect to be determined by, the laws of Texas.—Seiders v. Association, 54 S. W. 753, 93 Tex. 194, reversing (Civ. App. 1899) 51 S. W. 547.

[s] (Tex. Sup. 1900) The legal effect of an insurance contract, making the principal and premiums payable in a state other than that of the insured's residence, is to be determined by the laws of such state.—Seiders v. Association, 54 S. W. 753, 93 Tex. 194, reversing (Civ. App. 1899) 51 S. W. 547.

3. Premiums.

[a] (Ky. App. 1867) Where notes sued on were given for premiums for insurance, and a contract was made through an agent in Indiana, the lex loci must determine their legality, validity, and effect, and therefore, if under the law of Indiana the policy of insurance is void, the notes cannot be enforced.—Archer v. Insurance Co., 2 Bush, 226.

[b] (Mass. Sup. 1898) Insurance brokers in New York were requested by a company's agents there to obtain insurance for them in a Massachusetts company on property in Maryland. The application was received in Boston, and the policy was made and signed there, and the policy was mailed at Boston to the agent of the insured, in New York. *Held*, that the policy was a Massachusetts contract.—Commonwealth Mut. Fire Ins. Co. v. Wm. Knabe & Co. Mfg. Co., 50 N. E. 516, 171 Mass. 265.

[c] (Mass. Sup. 1899) M. was an insurance broker in Illinois, who, on the request of B., who was manager of an insurance company in Massachusetts, and received as compensation a per cent. of the gross receipts, forwarded applications to the company, in which the terms and rates were agreed on, should the company see fit to accept them. M. was paid his commission by B. The applications were acted on by the company in Massachusetts, and the policies mailed to M., who delivered them to the insured. *Held*, that the policies were Massachusetts contracts.—Commonwealth Mut. Fire Ins. Co. v. Fairbank Canning Co., 53 N. E. 373, 173 Mass. 161.

[d] (Mich. Sup. 1896) A contract between a resident of Michigan and a Minnesota mutual insurance company, whereby the former becomes a member of the company, and agrees to pay the annual premium and such further sums as the company shall assess, for losses and expenses, pursuant to its charter and by-laws, etc., is a Minnesota contract; and since, under the statutes of that state, as interpreted by its courts, an assessment for unearned premiums on simple cash policies is valid, the same rule will govern in an action on the premium note of such member in the courts of Michigan.—Warner v. Delbridge & Cameron Co., 68 N. W. 283, 110 Mich. 590, 34 L. R. A. 701.

[e] (N. Y. Sup. 1899) A contract of insurance between a citizen of one state and a corporation of another state, made and to be performed in that state, insuring property within the former state, where the corporation is not authorized to do business in the former state, whose insurance laws declare

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contracts by insurance companies not authorized to do business therein void, is not so repugnant to public policy as to warrant a court in refusing to enforce it.—Insurance Co. v. Hilton, 58 N. Y. Supp. 996, 42 App. Div. 52.

4. Assignment of Policy.

[a] (Conn. Sup. 1884) Where a life insurance policy is issued by a Connecticut corporation to a resident of New York, an assignment thereof, executed in New Jersey, is governed by the laws of that state.—Insurance Co. v. Westervelt, 52 Conn. 586.

[b] (Ind. App.) An assignment of a life insurance policy is governed by the laws of the place where the assignment is made.—(1894) Insurance Co. v. Woods, 37 N. E. 180; (1895) Criswell v. Whitney, 41 N. E. 78, 13 Ind. App. 67.

[c] (N. Y. App. 1873) A policy issued by a corporation of New York under the act of 1840 relative to life insurance for the benefit of married women, the contract having been made in that state, was assigned by the wife to secure a debt of her husband. The assignment was executed in New York, and by his direction sent by mail to the creditor, who resided in Maryland. In an action brought in New York to determine the validity of the assignment, *held*, that the question was to be determined by the laws of New York. —Barry v. Society, 53 N. Y. 536.

[d] (N. Y. Sup. 1893) Laws 1879, c. 248, which provides that all policies of insurance "issued within the state of New York" on the lives of husbands for the benefit and use of their wives shall be assignable by the wife with the written consent of her husband, is applicable to policies made outside of the state by a foreign company authorized to do business within the state, and sent to its agent, to be delivered to a beneficiary, who, with her husband, are residents of the state.—Spencer v. Myers, 26 N. Y. Supp. 371, 73 Hun, 274.

[e] (Tenn. Sup. 1875) Where a contract of assignment of an insurance policy is consummated in New York, and the assignors reside in Tennessee, the lex loci contractus governs.—Pratt v. Insurance Co., 17 S. W. 352.

5. Forfeiture.

[a] (U. S. C. C. A., Wash., 1897) Where an application to a New York life insurance company for a policy is made in another state, where also the advance premium is paid to the company's agent to be forwarded to the company, under an agreement that the insurance is not to take effect unless the premium is accepted and the risk approved in New York, and, by the terms of the policy issued, all premiums and the policy itself are payable in New York, and proof of death is to be there made, the policy is a New York contract, and the rights of the parties thereunder are governed by the statutes of New York, there being no statute in the other state affecting the rights of the parties.—Society v. Nixon, 26 C. C. A. 620, 81 Fed. 796; Society v. Trimble, 27 C. C. A. 404, 83 Fed. 85.

[b] (U. S. Sup., Mo., 1890) A resident of Missouri signed in that state an application for life insurance. The policy was executed by the insurer at its office in New York, and transmitted to Missouri, where it was delivered to the assured, and where the premiums thereon were paid. *Held*, that the policy only became a completed contract on its delivery and the payment of the premium in Missouri; so that it is a Missouri contract, and governed by the laws of that state.—Society v. Clements, 11 Sup. Ct. 822, 140 U. S. 226, 35 L. Ed. 497, affirming Wall v. Society (C. C. Mo. 1887) 32 Fed. 273.

[c] (U. S. Sup., Mo., 1890) A resident of Missouri signed in that state an application for a life insurance policy. The policy was executed and transmitted to Missouri, where it was delivered to the assured, and where the premium was paid. *Held*, that the policy only became a completed contract on its delivery and the payment of the premium in Missouri, so that it is a Missouri contract, and governed by the laws of that state.—Society v. Clements, 11 Sup. Ct. 822, 140 U. S. 226, 35 L. Ed. 497, affirming Wall v. Society (C. C. Mo. 1887) 32 Fed. 273.

[d] (U. S. Sup., Mont., 1900) Insurance business transacted in other states by New York insurance companies, without any provision that the New York

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laws shall govern, is not subject to the provision of Laws N. Y. 1877, c. 321, § 1, for notice as a condition of the forfeiture of a policy for nonpayment of premium by any life insurance company "doing business in the state."—Insurance Co. v. Cohen, 21 Sup. Ct. 106, 179 U. S. 262, 45 L. Ed. 181, reversing (1899) 38 C. C. A. 696, 97 Fed. 985.

[e] (U. S. Sup., Mont., 1900) The provision in an application for life insurance made in another state to a New York company, that it is subject to the charter of the company and the laws of New York, is not sufficient to make the policy issued thereon, and which was delivered in such other state, subject to the requirement of Laws N. Y. 1877, c. 321, § 1, for notice as a condition of forfeiture for nonpayment of premium.—Insurance Co. v. Cohen, 21 Sup. Ct. 106, 179 U. S. 262, 45 L. Ed. 181, reversing (1899) 38 C. C. A. 696, 97 Fed. 985.

[f] (U. S. C. C. A., Ga., 1901) A contract of life insurance, made and delivered and the premiums paid in the state where insured resided, is a contract of that state and governed by its laws.—Association v. Jeffords, 46 C. C. A. 377, 107 Fed. 402.

[g] (U. S. C. C. A., Mo., 1893) A policy of life insurance, the first premium of which is paid in the state in which the assured resides, is governed by the laws of that state.—Society v. Winning, 7 C. C. A. 359, 58 Fed. 541, 19 U. S. App. 173.

[h] (U. S. C. C. A., Neb., 1896) Under Comp. St. Neb. 1893, c. 16, § 8, providing that any person in the state who shall receive or receipt for money for an insurance policy, or shall cause a contract of insurance to be made, for an insurance company, shall be deemed its agent, a policy made by an insurance company through a local agent in Nebraska is a Nebraska contract, notwithstanding a clause in the application that the policy should be construed according to the laws of New York, the place of the contract being agreed to be the home office of the company.—Insurance Co. v. Russell, 77 Fed. 94, 23 C. C. A. 43.

[i] (U. S. C. C. A., Wash., 1899) Where an insurance company in the state of New York issued a policy upon an application made at, and forwarded from, the company's office in the state of Washington, and proof of death and payment thereunder were to be made to and by the New York office, the policy is a New York contract.—Insurance Co. v. Hill, 97 Fed. 263, 38 C. C. A. 159, 49 L. R. A. 127.

[j] (U. S. C. C. A., Wash., 1901) A stipulation, in an application for life insurance, made in another state to a New York company, that the application is subject to the charter of the company and the laws of New York, is not sufficient to make the policy issued thereon, and afterwards delivered in the other state, subject to Laws N. Y. 1877, c. 321, making it a condition of the company's right to forfeit a policy for nonpayment of premiums that a notice of the accruing of premiums shall be given to the insured.—Insurance Co. v. Hathaway, 45 C. C. A. 655, 106 Fed. 815.

[k] (U. S. C. C., Mass., 1878) Where the contract of insurance is complete on the execution of the policy in the home office of the company, and not until then, the contract is governed by the law of the place of the home office, whether the policy be delivered first to the agent or to the insured.—Shattuck v. Insurance Co., Fed. Cas. No. 12,715 [4 Cliff. 598].

[l] (U. S. C. C., Mass., 1879) A policy issued by a foreign insurance company through a general agent in the state, who acts purely in a ministerial capacity, is not a contract governed by the laws of such state as to nonforfeiture.—Whitcomb v. Insurance Co., Fed. Cas. No. 17,530.

[m] (U. S. C. C., Mass., 1881) Policies of insurance issued by foreign companies doing business in Massachusetts under the laws thereof to citizens of Massachusetts are governed by the laws of the states where the companies were incorporated and where the contracts were to be performed.—Smith v. Insurance Co., 5 Fed. 582.

[n] (U. S. C. C., Wash., 1895) A life insurance policy applied for and delivered in Washington, but under which the premiums and the insurance, when due, are to be paid in New York, where proof of death is also to be made, is governed by the law of New York.—Phinney v. Insurance Co., 67 Fed. 493.

[o] (Md. App. 1891) A life insurance policy issued in Maryland by a Penn-

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sylvania company, according to the terms of which the insured warrants every answer contained in his application "to be full, complete, and true," is invalid, in so far as it conflicts with the Pennsylvania statute which provides that no misrepresentation or untrue statement in an application for life insurance, made in good faith by the applicant, shall effect a forfeiture or be a ground of defense, unless it relates to some matter material to the risk, since a corporation is bound by the laws prescribed by the sovereign authority from which it derives its corporate existence.—Association v. Ficklin, 21 Atl. 680, 23 Atl. 197, 74 Md. 172.

[p] (Mass. Sup. 1898) Unless the parties to a contract of insurance intended otherwise, the place of performance will ordinarily be deemed to be the place of the contract.—Bottomley v. Insurance Co., 49 N. E. 438, 170 Mass. 274.

[q] (Mass. Sup. 1898) Where a policy of life insurance was originally a Rhode Island contract, the fact that after it had lapsed a beneficiary under it, who resided in Massachusetts, made an application for its revival, and conducted negotiations therefor on her part, and received back the revived policy, and paid the premiums, in the latter state, did not render the policy, as revived, a Massachusetts contract; it appearing that the insured still remained the only party contracting with defendant company, and that she continued a resident of Rhode Island until her death.—Bottomley v. Insurance Co., 49 N. E. 438, 170 Mass. 274.

[r] (Mass. Sup. 1899) Under St. 1894, c. 522, §§ 77, 78, requiring foreign insurance companies to first obtain permission to transact business within this state from the insurance commissioner, and to transact such business only through resident agents, and providing that their contract shall be subject to the laws of the state, a life policy of a foreign assessment company, issued to a resident of the state through the company's resident agent, is a Massachusetts contract, governed by section 21, providing that misrepresentations in an application for insurance shall not avoid the policy, unless made with respect to matters increasing the risk, or with actual intent to deceive, which, under St. 1890, c. 421, § 27, applies to assessment insurance.—Dolan v. Association, 53 N. E. 398.

[s] (Mo. Sup. 1899) A policy of life insurance issued by a New York company on an application made in Missouri, which provides that the policy is not to be in force until actual payment of the premium to the company, and delivered to the insured in Missouri on payment of the premium, is a Missouri contract, and subject to its insurance laws, though New York City, by the policy, is made the place of contract.—Cravens v. Insurance Co., 50 S. W. 519, 148 Mo. 583, 71 Am. St. Rep. 628.

[t] (Mo. App. 1892) Where a life insurance company issues policies to residents thereof, the policy, by provisions as to forfeiture for nonpayment of premiums, will be determined by the statutes of Illinois, which make ineffectual a waiver of their effect.—Price v. Insurance Co., 48 Mo. App. 281.

[u] (N. H. Sup. 1892) Plaintiff made application to agents of defendant in New Hampshire for insurance, and heard nothing from it until the agents delivered him a policy executed by defendant, and received the premium. *Held*, that the contract of insurance was made at the time and place of the delivery of the policy, and the rights of the parties thereunder were governed by the laws of New Hampshire.—Perry v. Insurance Co., 33 Atl. 731, 67 N. H. 291, 68 Am. St. Rep. 668.

[v] (Tex. Civ. App. 1901) Where a life policy provides that it shall be construed and governed by the laws of another state, the statutes applicable are considered as part of the written contract.—Insurance Co. v. Orlopp, 61 S. W. 336.

[w] (Wash. Sup. 1894) Laws N. Y. 1877, c. 321, providing that no life insurance company doing business in New York state shall have power to declare a policy forfeited or lapsed for nonpayment of any premium, unless notice stating the amount of such premium, the place where and person to whom the same is payable, shall first be given the assured, applies only to policies issued in the state of New York, and not to policies issued in other states by New York companies.—Griesemer v. Insurance Co., 38 Pac. 1031, 10 Wash. 202.

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6. Proofs of Loss.

[a] (Me. Sup. 1869) An insurance company, chartered by the legislature of Rhode Island, appointed an agent to do business in Portland, Me., complying with the laws of Maine relative to foreign insurance companies. Plaintiff, residing in New Hampshire, wrote to the agent at Portland, asking for a policy upon a building situated in New Hampshire belonging to the plaintiff and his partner. The agent at Portland issued and sent from there a policy to plaintiff. *Held*, in an action on the policy brought in Maine, that the place of the contract was in that state, and it is governed by its laws as to proof of loss.—Bailey v. Insurance Co., 56 Me. 474.

7. Distribution of Proceeds.

[a] (Conn. Sup. 1894) A Massachusetts benefit association's certificate, issued to a resident of that state, is to be construed by its laws, and, if written in favor of the member's "heirs at law," is payable to the persons (including the widow), and in the proportions prescribed by the Massachusetts statute of distributions in the case of intestate personalty.—Mullen v. Reed, 29 Atl. 478, 64 Conn. 240, 24 L. R. A. 664.

[b] (Mass. Sup. 1901) The rights of beneficiaries under a life policy, which is issued in New York, to be delivered and accepted in Massachusetts, on payment of the premiums, must be settled by the laws of Massachusetts, and not by the laws of New York, though the policy stipulates that the premiums and the sum insured are to be paid in New York.—Millard v. Brayton, 59 N. E. 436.

[c] (Miss. Sup. 1893) While in Mississippi, W. insured in defendant company, the policy being payable in New York, and left in Mississippi for safekeeping. *Held*, that the proceeds of the policy were distributable under the laws of Virginia, the place of his domicile.—Mayo v. Society, 15 South. 791, 71 Miss. 590.

[d] (Tenn. Sup. 1898) A life insurance policy issued in Alabama, to a resident of that state, by a company whose home office is in New Jersey, is governed by the laws of Alabama.—Roberts v. Winton, 45 S. W. 673, 100 Tenn. 484, 41 L. R. A. 275.

[e] (Wis. Sup. 1890) A contract of insurance, having been entered into in Wisconsin, in which state the policy was delivered, and the insurance money paid, is governed by the laws of Wisconsin, though the policy was issued by a Massachusetts corporation.—In re Breitung's Estate, 46 N. W. 891; Adler v. Stoffel, Id.

[f] (Eng. App. 1895) Policies of assurance on his life were effected by a domiciled Englishman with an American assurance company, through its English branch office. The moneys assured were expressed to be payable to the wife of the assured for her sole use, if living, "in conformity with the statute," and, if not living, to the children of the assured, or their guardian for their use, or, if there should be no such children surviving, then to the executors, administrators, or assigns of the assured. *Held*, that the policies, in accordance with the intention of the parties, must be construed, so far as related to the distribution of the assurance moneys, in accordance with the lex loci solutionis,—the law of the place of domicile of the assured,—and that all the children of the assured took vested interests as tenants in common.—Crosland v. Wrigley, 73 Law T. (N. S.) 327.

8. Actions.

[a] (Ohio C. C. 1893) Where the beneficiaries seek to enforce a contract of insurance by a foreign company doing business in the state, the rights of the parties will be governed by the laws of the state, though the insured and the company have agreed that the contract shall be regarded as made under the laws of the state of the company's residence.—Insurance Co. v. Block, 12 Ohio Cir. Ct. R. 224.

[b] (W. Va. App. 1898) If a policy provides that it shall not be valid until countersigned by its agent at a certain place, it is a contract of the state where so countersigned.—Galloway v. Insurance Co., 31 S. E. 969, 45 W. Va. 237.

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[c] (W. Va. App. 1898) Where application is sent by an applicant or his agent from one state to an insurance company of another state, and there accepted, and a policy is there issued, it is a contract of the state where issued.—Galloway v. Insurance Co., 31 S. E. 969, 45 W. Va. 237.

9. *Extent of Loss.*

[a] (U. S. C. C., Mo., 1896) An insurance policy, issued by a Connecticut company, through its Minnesota agency, on real estate in Minnesota, and drawn with reference to Minnesota law, though delivered in Missouri to a resident of that state, is a Minnesota, and not a Missouri, contract.—Gibson v. Insurance Co., 77 Fed. 561.

[b] (La. Sup. 1828) A contract of insurance is governed by the laws of the place where it was entered into as to liability for loss by way of general average.—Shiff v. Insurance Co., 6 Mart. (N. S.) 629.

(107 Fed. 302.)

CROWELL v. UNION OIL CO.

(Circuit Court of Appeals, First Circuit. April 9, 1901.)

No. 326.

SHIPPING—INJURY TO CARGO—BURDEN OF PROOF.

Where a charter party and a bill of lading contain exceptions in behalf of the vessel of breakage and leakage and of dangers of the sea, and the cargo owner maintains that the true cause of injury to the cargo was improper stowage, the burden of maintaining this proposition rests on the cargo owner.

Appeal from the District Court of the United States for the District of Rhode Island.

Eugene P. Carver (Edward E. Blodgett, on the brief), for appellant.

Cyrus M. Van Slyck, for appellee.

Before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge.

PER CURIAM. This appeal arose out of a libel brought by the agent of the schooner Maria O. Teel for freight for transporting a cargo of oil. The cargo owner answered for a defense that the cargo was not delivered in good order, and that the damage ensuing was somewhat in excess of the freight money claimed. The district court entered a decree for the cargo owner, dismissing the libel, and the vessel appealed. The charter party and bill of lading contain exceptions in behalf of the vessel of breakage and leakage, and of the "dangers of the seas," but the cargo owner maintains that the true cause of the injury to the cargo was improper stowage at the port of lading. Under the circumstances of the case, the burden of maintaining this proposition rests on the cargo owner, as was determined in Transportation Co. v. Downer, 11 Wall. 129, 20 L. Ed. 160. The district court found that the cargo owner had fully sustained this burden. Inasmuch as the question involved is purely one of fact, depending on somewhat conflicting evidence, it is not necessary in this case that we do anything more than state that we fully

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agree with the conclusions of the court below. The decree of the district court is affirmed, and the costs of appeal are awarded to the appellee.

(107 Fed. 303.)

THE ALBERT H. ELLIS.

THE HUDSON CITY.

(Circuit Court of Appeals, Second Circuit. March 12, 1901.)

No. 105.

COLLISION—SUBSEQUENT NEGLIGENCE OF INJURED VESSEL.

In an action for collision, it appeared that a ferryboat struck a scow in tow on the forward end, which projected with an overhang. The collision was the fault of the ferryboat. The man on the tug examined her at the time with a lantern, it being after dark, and the scow being heavily laden and deep in the water. He discovered no apparent damage, and the tow proceeded. When some distance from the place of collision, the scow sank. An inspection after she was raised showed injury below the water line. *Held* insufficient to show negligence on the part of the tow in continuing on the voyage, so as to relieve the ferryboat from the consequences of the collision.

Appeal from the District Court of the United States for the Eastern District of New York.

This cause comes here upon appeal from a decree of the district court, Eastern district of New York, holding the Hudson City solely at fault for collision with libelant's scow in tow of the tug, and condemning her for the damage to the scow, being $5,722.96. Upon this appeal it is not contended that there was any error in the findings of the district court as to the navigation which ended in collision, or in the conclusion that the Hudson City was solely in fault for such collision. The collision took place off Desbrosses street, North river, the ferry boat, bows on, striking the scow a severe blow on the forward end, which projected with an overhang. This took place between 6 and 7 o'clock p. m., the tug, towing two scows loaded with mud, being bound for the dumping buoy outside the harbor. The flotilla proceeded on its way, and about an hour after collision, when some distance south of Castle William, between the bell buoy and Governor's Island, the scow sank. When she was raised and put into the hands of the repairers, it appeared that a large part of the damage requiring attention had apparently been produced by some vessel running over her while she lay on the bottom. The appellant contends that it should not be held to respond for such damage, which it insists was not proximately caused by the collision, but was due to the negligence of those in charge of the tug or tow, or both.

Charles M. Hough, for appellant.

Harrington Putnam, for the Ellis.

Albert A. Wray, for libelant.

Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. The answer of the Hudson City alleges:

"Seventh. And for a further and independent defense the claimant avers that, if the libelant's scow was injured as claimed in the libel, there is no reason why, by proper vigilance and care, she should not have been kept free of water or taken to a place of safety before she sank."

This point is not discussed, either in the opinion of the district judge or in the report of the commissioner.

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The Ellis had two scows in tow, the libelant's, No. 15, on a hawser, with 35 to 40 fathoms out, and the other, No. 17, astern of No. 15, on a short hawser of about 15 feet. There was a man assigned to each scow. At the moment of collision, Davis, the man assigned to No. 15, was on No. 17. He at once went aboard No. 15, took a lantern from the after bitt, and with its assistance walked around and looked to see if there was any injury. He perceived none; saw "no timbers broke up to the deck; none of the deck timbers seemed to be sprung up." Meanwhile the Ellis had hauled the scow up to within 15 fathoms, and her master hailed to know if there was any damage, to which Davis replied, "All right;" whereupon the tug proceeded on her course. It is true that Davis did not go clear to the forward edge of the scow, and lean over to make an inspection below the water line, but from the description of the wound inflicted we are not satisfied that, had he done so, he would have made any discovery which would have called for a prompt return to shoal water. As stated before, the scow was heavily laden and deep in the water. It was dark, her wound was below the level of the water, and her end overhung. Presumably Davis could not have seen the leak. Two witnesses who saw the scow after she was raised give conflicting descriptions of the appearance of the collision wound. One of them (Shewan) says that the bumper log (the biggest log in the scow, that goes across the end, and forms a part of the end and a part of the deck) was cracked, and that below it her bow planks were shoved in and broken right off. The timbers and everything else went right in, and left a large hole, six inches by two or three feet. This story seems incredible. With a hole like that below the water line at the forward end, the scow would not have floated long enough to get out of the North river. The other (Bullis) apparently made a more careful examination. He made measurements, and prepared a diagram, to which he testified. He says: "We saw at the bow of her there was one butt with a plank started off, sprung off about four inches,—a plank, 6x10,—and there were five others that were cracked, but not broken through; and her bumper was cracked, not shoved back." The planking was broken, but there was no hole at all. She would, however, make water near the butt that sprung off, enough to sink her in time. The record falls short of making out a case of such negligence in continuing on the voyage as would relieve a conceded wrongdoing from the natural consequences of the collision.

It is further contended by appellant that the damages sustained while lying on the bottom were due to faults of the owner or of the tug in failing to buoy, watch, or mark the wreck. There is no such charge of fault in the pleadings, and evidently none of the testimony was directed to any such issue. In consequence, the record is barren of information which might be helpful towards a conclusion. The point need not be considered here. The decree of the district court is affirmed, with interest, and a single bill of costs against appellant, to be divided between appellees.

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(107 Fed. 305.)

LOUISVILLE TRUST CO. v. STONE, Auditor, et al.

(Circuit Court of Appeals. Sixth Circuit. April 2, 1901.)

No. 733.

1. TAXATION — ASSESSMENTS— DISCRIMINATION—INJUNCTION—INTERFERENCE OF FEDERAL COURT.
   Every presumption being in favor of the propriety of the action of assessment officers, and errors of judgment on their part not being a subject for injunction, proof that systematic discrimination is being made against a complainant corporation must be clear and convincing, and conclusively preponderate over opposing evidence, before a federal court will interfere by injunction in its behalf.
2. SAME—JURISDICTION OF FEDERAL COURTS.
   Jurisdiction of a federal court having been properly invoked for relief against assessments as discriminating against complainant, and thus depriving it of the equal protection of the laws under the fourteenth amendment, the bill, where complainant fails to show discrimination, may be retained to administer relief on other grounds, though the state courts could afford adequate remedy.
3. SAME—ILLEGAL TAXATION—RELIEF IN EQUITY—INADEQUATE REMEDY AT LAW.
   A suit in equity lies to enjoin illegal taxation in Kentucky, as the statutes of that state do not afford an adequate remedy at law.
4. SAME—CORPORATE STOCK—AFFIDAVIT FOR INJUNCTION—SUFFICIENCY.
   In support of an injunction against the taxation of corporate stock belonging to complainant, a Kentucky corporation, its president made affidavit that it owned the stock of the M. Co. in question; that it stood on its books at a specified value, and formed a part of complainant's reported capital and surplus; and that the M. Co. was a Kentucky corporation, and as such pays taxes on its property and franchises. *Held*, in the absence of contradiction, to fairly establish that the M. Co. was a Kentucky corporation, which paid taxes on its property and franchises, thus excluding complainant, as an individual stockholder, pursuant to Ky. St. §§ 4085, 4088, from taxation on its holdings therein.

Appeal from the Circuit Court of the United States for the District of Kentucky.

James P. Helm, for appellant.
Lewis McQuown, for appellees.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

DAY, Circuit Judge. This is a bill to enjoin the board of valuation and assessment of the state of Kentucky from assessing the property of the complainant at more than 70 per cent. of the face value thereof, and from taxing certain stock, the property of complainant, upon the ground that said stock is held in a Kentucky corporation, which, by the laws of the state, pays taxes on all of its property. It may be conceded that, if the allegations of the bill are made out, there exists in respect to the property of complainant, and others similarly situated, a systematic, intentional, and illegal undervaluation of other property by the taxing officers of the state, which necessarily affects an unjust discrimination against the property of which the plaintiff is the owner, and a bill in equity will lie to restrain such illegal discrimination, and that in such cases

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federal jurisdiction will arise because of the equal protection of the laws guarantied by the fourteenth amendment. Taylor v. Railroad Co., 31 C. C. A. 537, 88 Fed. 350; Railway Co. v. Taylor (C. C.) 86 Fed. 168, in which the grounds of federal jurisdiction are carefully examined and fully stated by Judge Clark, who delivered the opinion. The questions principally argued, and upon which this case turns, are those of fact. It appears that there existed in the state of Kentucky a statute which authorized the state board of equalization to fix the percentage of value of real property for taxation at 70 per cent. of the cash value, to raise the valuation to that amount in counties whose list of real property was below that standard, and to lower it in those counties whose average lists are above the same; also personal property was to be equalized by adding to and subtracting from the list of personal property, as the case may be, the same per centum as was added to or subtracted from the list of farm lands for the same county, and for this purpose the average per centum of assessed value to the cash value of farm lands should be used. Sections 4274, 4275, Ky. St. After the passage of these statutes, the new constitution of Kentucky went into effect, which provided:

"Sec. 172. All property not exempt from taxation by the constitution shall be assessed for taxation at its fair cash value estimated at the price it will bring at a fair voluntary sale."

This constitution went into effect in 1899. It established a rule for taxation inconsistent with the prior statutes, and must be taken as repealing those statutes which are in conflict with the constitutional provision. November 11, 1892, an act was passed (section 4020, Ky. St.), which provides:

"All real and personal estate within this state, and all personal estate of persons residing in this state, and of all corporations organized under the laws of this state, whether the property be in or out of this state, including intangible property which shall be considered and estimated in fixing the value of corporate franchises as hereinafter provided, shall be subject to taxation unless the same be exempt from taxation by the constitution, and shall be assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale."

Also section 4267:

"All acts and parts of acts in conflict with this act are hereby repealed, except an act entitled 'An act to provide additional funds for the ordinary expenses of the state government,' approved June 4, 1892, and also except an act amendatory thereof, approved July 6, 1892."

The value of the complainant's property, as assessed by the board having authority over the property of such corporations, being the defendants in this case, may be said to be the full cash value of the property. The contention upon this branch of the case is that the state board of equalization, in equalizing the other property of the state systematically and uniformly, and particularly in the years 1897 and 1898, assessed and valued other property at only 70 per cent. of its fair cash value. If this is true, there is manifest discrimination against the complainant. It has procured affidavits of 8 members of local boards of supervisors, before whom the returns

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of the assessors go, 26 county court clerks and ex county court clerks, 31 sheriffs and ex-sheriffs, 24 county judges and ex county judges, 3 county attorneys, 1 mayor, 1 magistrate, and 1 county treasurer; also the affidavits of certain persons who claimed at certain times to have appeared before the state board of equalization; also the affidavit of one George M. Willis, a member of the state board of equalization for the year 1898. The tendency of this testimony is to show that in the years mentioned the other property of taxpayers of the state was assessed at not above 70 per cent. of its fair cash value. Complainant also presents the affidavit of Mr. Johnson, deputy auditor, who undertook to make a comparison between the assessed values and the cash sales as reported by the clerks of the various county courts in the state with a view of ascertaining what proportion the assessed value bore to the prices of lands reported in said sales for the period between September 15, 1895, and the same date in 1896. The result was that the assessed value of lands in 114 counties, as equalized by the board of equalization, is 71.89 per cent. of the total value of said lands as indicated by said sales. Mr. Johnson also stated that this was a year of very great depression in real estate values. He also produced a table showing the assessed value of farm lands of Kentucky for the years 1894 to 1898, inclusive, as equalized by the state board. This table indicates but little variation in the equalized value of the lands for the years given. To meet this testimony, the appellees offered the affidavits of 95 county assessors, who assessed the real and personal property in their counties for the years 1897 and 1898, each of whom swears that the real and personal property of his county was assessed for taxation at its fair cash value, estimated at the price it would bring at a voluntary sale. The affidavits of 52 county clerks who were in office in 1897, and were ex officio the clerks of the board of tax supervisors, and 62 county clerks for the year 1898, were filed by appellees. These affidavits are, in substance, that the property was valued in like manner at its fair cash value. The affidavits of four members of the state board of equalization for the years 1897 and 1898 were offered in evidence, and they make oath that the rule of the members was to fix the value of all real estate, personal property, and town lots in each and every county in the state that was subject to taxation at its fair cash value, and that no attempt was made to value the property at 70 per cent., or any other per centum less than 100 per cent., of its fair cash value. Mr. Scott, chief secretary of the state board of equalization in the years 1897 and 1898, says, in his affidavit, that property was valued at its fair cash value; that when below this the value of the property was raised, and when above it was lowered; and that the board had adopted a rule in these years to thus value property. He states that he made the calculations used by the board in 1898; that he used a table showing the assessed value of farm lands and town lots for the past five years. He then ascertained what per centum should be added or deducted, as the case might be, from the farm lands and town lots to bring them to the average, and that he made like calculations for the years 1897 and 1898. These tables were

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laid before the board, and they passed preliminarily upon the several counties; and he mailed notices to the 119 county judges of the action of the board, notifying them of the day fixed to hear their county, and requested them to send witnesses, not exceeding five, one of whom should be the county assessor. The assessors, with some exceptions, testified that they had assessed the property at its fair value; that they endeavored to value the property at what it was worth, estimating the value in cash, and at a price it would bring at a fair voluntary sale. It appears that these several assessing officers were all sworn to assess the property at its fair cash value.

Upon consideration, the proof seems to us to fail to make out a case by that preponderance of evidence which is required by a court of equity to justify interference with the action of the state officers in making the assessment of complainant's property. Every presumption is in favor of the propriety of their action. Errors of judgment on their part will not be enjoined. The proof must be clear and convincing that a systematic discrimination is being made against complainant before a federal court will interfere by injunction with the assessment of taxes and the collection of revenues of the state. Great stress is laid on the part of complainant upon the facts stated and deductions to be made from the affidavits of Mr. Johnson. It is true that the year concerning which he testifies shows a percentage not far from 71.89 per cent. of the sale values to have been the assessed value for that year. Also the tables for the years from 1894 to 1898 show little change in the assessed value of farm lands in Kentucky. The argument is that such valuations are inconsistent with the change in the method of assessments alleged to have been adopted by the board of equalization for the years 1897 and 1898; that such uniformity shows that the 70 per cent. plan must have been pursued during all the years. There is much force in this argument. If the testimony before the board of equalization for each of those years was before us for comparison with the results reached, it would be much more convincing, and the result might be a demonstration of one theory or the other. We have not the testimony. We do not know what the proof shows for any given year. It may be that the depression in values for the years 1897 and 1898 would make the fair value for those years not far from 70 per cent. of the value of previous years. The conclusiveness of these tables depends upon the character of the testimony before the board for each of the several years. Not knowing what the testimony was, we do not feel justified in setting aside the sworn testimony of the great majority of the officers concerned that the lands were valued at their fair cash value. While Mr. Scott says a table was used in fixing valuations, he also adds that other testimony was adduced before the board. We are not satisfied that the allegations of the complainant of unjust discrimination against it have been made out by the convincing proof required, and we think the learned judge who heard the case in the court below was justified in withholding the injunction asked upon this ground.

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2. A further ground of relief alleged in the bill concerns the assessment of 479 shares of stock held by the complainant corporation in the J. G. Mattingly Company, a Kentucky corporation, which it is alleged paid taxes on all its property, and therefore it is claimed complainant, by the laws of the state of Kentucky, is exempt from taxation upon the shares of stock held by it in said company. Notwithstanding the failure of complainant to establish its right to relief upon the ground of federal jurisdiction, alleging the unjust discrimination against it in assessing its property at its full value while other property in the state was assessed at 70 per cent. of its face value, thus depriving complainant of the equal protection of the laws under the fourteenth amendment, the jurisdiction of the court having been invoked for that purpose, the bill may be retained to administer full relief concerning the assessment upon the property of complainant based upon the ownership of said shares of stock in the Mattingly Company. If the claim to relief clearly within the federal jurisdiction is fair and colorable, not fictitious and fraudulent, jurisdiction attaches, although the ultimate decision may be against the right claimed. Penn Mut. Life Ins. Co. v. City of Austin, 168 U. S. 695, 18 Sup. Ct. 223, 42 L. Ed. 626. When the jurisdiction has properly attached, it extends to the whole case, and to all the issues involved, whether of a federal or nonfederal character, and the court has power to decide upon all questions involved. This was the statement of the principle in Railway Co. v. Taylor (C. C.) 86 Fed. 168, and seems to be amply supported by the authorities. New Orleans, M. & T. R. Co. v. Mississippi, 102 U. S. 135, 26 L. Ed. 96; Horner v. U. S., 143 U. S. 570, 12 Sup. Ct. 522, 36 L. Ed. 266; Scott v. Donald, 165 U. S. 71, 17 Sup. Ct. 265, 41 L. Ed. 632. The federal jurisdiction having been properly invoked, we may examine into the other questions made in the case, notwithstanding as to them there may be a remedy in the state court. In Bank v. Stone (C. C.) 88 Fed. 383, heard in the circuit court before Justice Harlan and Judges Taft and Lurton, it is expressly held that an action in equity will lie to enjoin illegal taxation in Kentucky, as the statutes of that state do not afford an adequate remedy at law. That case contains so full and complete a discussion of the subject that it is only necessary to refer to it. We think, therefore, that we have jurisdiction to inquire into the validity of the tax imposed upon so much of complainant's property as is represented by this stock in the Kentucky corporation. There is no dispute as to the fact that at a value of $46,407 it was included in making up the amount upon which complainant was assessed. It is claimed that there is no proof in the case showing that the corporation is of the character required to exempt its stockholders from taxation, or that the corporation in fact paid taxes upon its property. Ky. St. §§ 4085, 4088, provide, in substance, that the property of all corporations, except where therein differently provided, shall be assessed in the name of the corporation in the same manner as that of a natural person, except that, when legally called on, the chief officer shall report a full statement of the property of such corporation for taxation, and for failure shall be subject

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to the penalties in the article provided; and, so long as said corporation pays the taxes on all its property, the individual stockholders shall not be required to list their shares in said corporation. The individual stockholders of the corporations, which are by this article required to report and pay taxes upon the corporate franchises, shall not be required to list their shares in such companies, so long as the corporation pays the taxes on the corporate property and franchises as therein provided. The testimony in this respect seems limited to the affidavit of H. V. Loving, president of the complainant corporation, who deposes that the corporation on the 31st day of December, in the years 1896 and 1897, owned, and still owns, 479 shares of the Mattingly Company stock; that said stock stood upon the books of the company at the value of $46,407, and said amount in the reports made as of said dates respectively entered into and formed a part of the capital and surplus of the trust company; that said J. G. Mattingly Company is a Kentucky corporation, and as such pays taxes upon its property and franchises. In the absence of contradictory proof, this affidavit seems to us to fairly establish that said company is a Kentucky corporation of the class which should pay and does pay taxes upon its property and franchises, with the result that individual stockholders are not to be taxed upon their holdings therein. It is true that there are other and better ways of showing that the concern is a Kentucky corporation, and the affidavit as to payment of taxes for the years in controversy is not as specific as it might well have been. There is no testimony, however, to meet the statements of this affidavit. It could have been readily shown, if such is the fact, that the taxes had not been paid. The proof was readily obtainable by the defendants to this bill. No such proof was offered, but the case is rested upon the claim that the affidavit does not make out the necessary facts. Fairly construed, we think that it does, and that it appears that so much of the assessment placed upon complainant's property as includes this stock is not properly made against it. We are of opinion, therefore, that the circuit court properly refused an injunction upon the ground of overvaluation of complainant's property compared with other property in the state, but that an injunction should issue as to so much of the assessment as is based upon the Mattingly Company stock at the value of $46,407. The order denying the temporary injunction, with this exception, is affirmed, and the cause is remanded, with instructions to grant a temporary injunction as to so much of the assessment as was made upon the Mattingly Company stock as above stated, and for such further proceedings as may be proper in the case.

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(107 Fed. 311.)

GUARANTY TRUST CO. OF NEW YORK v. GALVESTON CITY R. CO. et al.

SAME v. CITY OF GALVESTON et al.

(Circuit Court of Appeals, Fifth Circuit. March 19, 1901.)

No. 969.

1. MUNICIPAL CORPORATIONS—ORDINANCE AUTHORIZING STREET RAILROAD—CONSTRUCTION.

An ordinance of the city of Galveston embodied a contract between it and promoters of the Galveston City Railroad Company, whereby the latter was given the right to construct and operate its railway on condition that, in lieu of a percentage on its net receipts and of a bonus for the contract, 600 shares of its stock should be transferred to the city, as fully paid up. This was accordingly done, and it was entered as a stockholder on the company's books; and, as the ordinance provided, it was also represented by its mayor on the company's board of directors, when he voted for a resolution mortgaging the company's railway system. *Held*, that a further provision in the contract that, in the event that the company should allow itself to be incumbered with debt, the city should have a lien on the company's franchise and property, to be secured to it by proper process after its organization, did not make the city in any sense a creditor of the company, and that the lien was intended merely to secure its interest as a stockholder, giving it a preference in the distribution of the capital stock or net assets of the company, but postponing it to the rights of the mortgagee and other creditors.

2. CORPORATIONS—CONTRACT WITH STOCKHOLDER—PREFERENCE TO CREDITORS—VALIDITY.

A contract between a corporation and a stockholder by which the latter is to receive the par value or any part of his stock before all the corporate debts are paid is contrary to public policy and void.

3. STATUTES OF STATE—INTERPRETATION IN FEDERAL COURTS.

The federal courts will follow the supreme court of a state in the interpretation of its statutes.[1]

4. SAME—PROVISIONS AS TO RECEIVERS—APPLICATION TO RECEIVERS IN FEDERAL COURTS.

Rev. St. Tex. arts. 1472, 1489, 1490, authorizing the appointment of receivers, defining their powers and duties, and regulating their proceedings, are inapplicable to receivers in the federal courts.

5. STREET RAILROADS—MORTGAGE—FORECLOSURE—RECEIVERSHIP—ADMINISTRATION OF PROPERTY—PREFERRED CLAIMS.

A court of equity, engaged in administering mortgaged railroad property under a receivership in a foreclosure suit, in distributing the income or proceeds of the property may prefer to the prior mortgage lien unpaid claims for current expenses of its ordinary operation within a limited time before the receivership; and hence the preference in such a case of claims for current expenses of a street railroad accruing five or six months before the receiver's appointment was proper, but not of claims for labor and materials furnished, at the latest, a year and a half prior thereto, and for which the company's notes had been given and renewed beyond the date of the receiver's appointment.

6. SAME.

A creditor of a street-railroad company is not entitled to a preference over a mortgage lien in the distribution by a receiver of the income or proceeds of the property on foreclosure simply because that which he furnished the company prior to the receiver's appointment was for the pres-

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[1] State laws as rules of decision, see notes to Griffin v. Wheel Co., 9 C. C. A. 548; Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.

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ervation of the property and for the benefit of the mortgage security, though that would be important in considering the equity of his claim to a preference.

7. MORTGAGES—DELIVERY—PRESUMPTION.

The date of acknowledgment of a mortgage differing from the date of the mortgage, the mortgage, in the absence of any evidence on the subject, will be held to have been delivered when it purports to be acknowledged.

8. MORTGAGE OF STREET RAILROAD—SCOPE OF LIEN—AFTER-ACQUIRED PROPERTY.

A mortgage of a street-railroad system covering after-acquired property creates a lien on engines thereafter furnished to the company in constructing a plant which was a part of its system, and is not to be displaced by a stipulation in the contract of sale that title should not pass till they were fully paid for.

9. CHATTEL MORTGAGES—FAILURE TO RECORD—PRIORITIES.

Rev. St. Tex. art. 3328, provides that mortgages or other instruments intended to operate as liens on undelivered personalty shall be absolutely void, as against subsequent mortgagees in good faith unless forthwith deposited for record; and hence a Texas chattel mortgagee that failed to record its mortgage till several months after another mortgagee had secured in good faith an effective mortgage on the same property lost its priority.

Appeal from the Circuit Court of the United States for the Eastern District of Texas.

On October 13, 1897, the Guaranty Trust Company of New York, as complainant, filed its bill against the Galveston City Railroad Company, as defendant, for the foreclosure of a mortgage executed by the defendant upon its entire system of railways and other property, particularly described therein, then owned by it in the city of Galveston, or that should be thereafter acquired by it, to secure its several consolidated mortgage bonds, for the sum of $1,000 each, and aggregating $1,000,000, dated January 1, 1893, and praying the sale of the mortgaged property, in the usual form in such bills. A receiver was appointed, in accordance with the prayer of the bill, who immediately qualified and took possession of the property. On August 14, 1898, the complainant filed an amendment to its bill, by which it made the city of Galveston a party defendant, alleging that said defendant the city of Galveston was the holder and owner of 600 shares of the capital stock of said Galveston City Railroad Company, and that said city of Galveston, by virtue of such ownership and of certain contracts and agreements with said railroad company relating thereto, claims some interest in or lien upon the mortgaged property. The city of Galveston answered, and alleged that by virtue of its ownership of said stock, and of the contracts or agreements referred to, it was the owner of an undivided interest in all the property of said Galveston City Railroad Company, which undivided interest was free and clear of all debts of the company, but stated, if it should be held that its interest in the affairs of said railroad company is not as tenant in common of the property and franchises of said company, that at least its said 600 shares of the capital stock thereof, at not less than their par value, constitute a preferred claim against all the corporate property and franchises of said railroad company, and that out of the same, or the proceeds thereof if sold, it was entitled, over and before all other claims, including that of the complainant, to receive the full amount of its said shares of capital stock at not less than their par value. The promoters of the incorporation and organization of the defendant railroad company entered into a contract with the city of Galveston, defendant, that, in consideration of the granting by the city to said promoters of certain franchises, rights of way, and other privileges, the promoters, for themselves, and for the defendant railroad company when incorporated and organized, stipulated and agreed to construct and operate a street-railway system in said city of Galveston, and to make over and transfer to said city, in lieu of percentage on the net receipts of the railroad so constructed and operated, and

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in lieu of bonus for the contract, 600 shares of the capital stock of said railroad company, free of cost and expense to the city.

By act of the legislature of the state of Texas the said railroad company was incorporated and organized, and the railroad constructed, equipped, and operated as contemplated by said contract. The provisions of the contract referred to, material to the question in controversy, are as follows, to wit: "(1) Said party shall make over and transfer to the city of Galveston, in lieu of percentage on the net receipts of said roads, and in lieu of bonus for this contract, six hundred shares of the capital stock of said railroads; said six hundred shares of stock to be paid up by said party, or the company to be formed under this contract and franchise, as assessments on said stock may be made and payment required by said party or company. (2) The mayor of the city of Galveston, or some person designated by him, shall have his name placed continuously on the directorial ticket of said company, to represent the interests of the city in the said stock; and he shall be elected a director of said company at the election of directors. (3) In the event that said company shall allow itself to become incumbered by debt to the jeopardy of the city's interest therein, then the city shall be regarded as having thereby a first lien on the franchise and the roads and fixtures and corporate property of said company, and the same shall be secured to the city, by proper process, immediately after the organization of said company. (4) The said railroad, cars, fixtures, and other appurtenances shall revert to the city, if the city shall so determine, at the expiration of said twenty years' privilege, on a valuation to be ascertained by two disinterested persons, one to be appointed by the company and the other by the city; and, in case of disagreement as to said valuation between said persons thus appointed, a third party or umpire shall be appointed by one of the district courts, the decision thereby had to be final. (5) Know all men by these presents that whereas, on the 24th day of May, A. D. 1866, B. Rush Plumley and his associates did make and enter into a contract with the city of Galveston, in said state, dated the day and year aforesaid, wherein it was stipulated, among other things, that 'the said party shall immediately make over and transfer to the city of Galveston, as consideration for this franchise, six hundred shares of the capital stock of said railroads, said six hundred shares of stock to be free of all cost or assessment whatever to the city now or hereafter,' and also that 'in the event that said company shall allow itself to become incumbered by debt, to the jeopardy of the city's interest therein, then the city shall be regarded as having thereby a first lien on the franchise and the roads and fixtures and corporate property of said company for the security of the interest of the city in said company, and the same shall be secured to the city by a first lien to be executed by the president and directors immediately after the organization of said company'; and whereas, by an act of the legislature of said state approved October 8th, 1866, A. D., said Plumley and his associates were made a body politic and corporate by the name and style of the Galveston City Railroad Company, and the said company has been fully organized under the said act of incorporation, and has made over and transferred to said city, in pursuance of the stipulations of said contract, six hundred shares of the capital stock of ten thousand shares of said company; and whereas, the said company is desirous of complying fully and in all respects with the provisions of the said contract hereinbefore referred to: Now, therefore, in consideration of the premises and in pursuance of said contract the said Galveston City Railroad Company have granted, bargained, and mortgaged, and by these presents do grant, bargain, and mortgage, unto the said city of Galveston the franchises, roads, fixtures, and corporate property of said company, to have and to hold the same unto the said city of Galveston and its assigns forever. This instrument is intended to create and does create a first lien on the franchise, roads, fixtures, and corporate property of said company in favor of the said city of Galveston, for the purpose of securing the interest of said city in said company in the manner and to the extent provided for in the contract hereinbefore referred to, and is not intended to create a lien for any other purpose whatever."

On October 29, 1898, the United States Mortgage & Trust Company of New York filed in the same court its bill of complaint against the same defendants,

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to foreclose a second mortgage executed to it, as trustee, by said railroad company, to secure certain bonds therein described, on which default in the payment of the interest had been made. The bill was answered by both defendants, the city of Galveston making the same answer to this bill that it had previously made to the bill of the Guaranty Trust Company of New York. On March 14, 1899, the two foreclosure suits were, by order of the court, consolidated, under the number of 337, upon the equity docket of the court. On March 24, 1899, a final decree was rendered foreclosing both mortgages referred to, and ordering a sale of all the property covered by them, free from all claims and demands, transferring such claims and demands to and upon the proceeds of the sale, with like but no greater effect than the same appertained to the said properties themselves, and reserving all questions respecting such claims and their rank and classification for future determination. Pursuant to the decree all the property was sold for the sum of $905,000, and the sale duly confirmed by the court. The mortgage executed by the Galveston City Railroad Company to the Guaranty Trust Company of New York (then bearing the name of the New York Guaranty & Indemnity Company) is dated January 1, 1893; but its acknowledgment by the president and secretary of the railroad company bears date May 13, 1893, and by the president and secretary of the New York Guaranty & Indemnity Company, May 22, 1893. The mortgage was recorded May 27, 1893.

The claim of the city of Galveston, as presented in its answer, on account of its ownership of the 600 shares of the capital stock of the Galveston City Railroad Company, coming on to be heard, a decree was rendered adjudging that the city was entitled to recover of the Galveston City Railroad Company the sum of $30,000, with interest from the date of the decree, and that the amount should be paid out of the proceeds of the sale of the property in the custody of the court prior to the claim and lien of the complainants or of any interveners in the cause. By leave of the court a large number of interventions and claims were filed and reported on by the master, whose appointment was provided for in, and made in accordance with, the order of the court filed with the original bill in the cause. Many interventions and claims against the Galveston City Railroad Company were held by the master and by the circuit court to be liens upon, and entitled to payment out of, the surplus earnings of the property accruing during the receivership, prior to the payment of the bonds or the interest thereon secured by the mortgages foreclosed. Some of these claims were allowed as superior liens and prior in right to that of the holders of the bonds solely on the ground that certain statutes of the state of Texas gave such lien and priority. Others were allowed on the ground that they were preferential claims with equitable liens, and were also preferential claims with a lien under and by virtue of the statutes of Texas referred to. Exceptions were duly taken before the circuit court to such allowances, which were overruled by the court, and decrees entered accordingly. The circuit court also entered a decree allowing the special master commissioner appointed to sell the property under the decree $7,500 as compensation for his services.

The Guaranty Trust Company of New York has appealed from the decree in favor of the city of Galveston for $30,000 on account of its interest in the defendant railroad company, also from the decrees entered on the various interventions and claims referred to, and also from the decree awarding the special master commissioner $7,500 as compensation for his services in selling the property. Of the errors assigned on the record by the appellant, the following assignments substantially cover all the points raised by them, to wit: "(1) The court erred: First, in rendering a decree in favor of the city of Galveston for thirty thousand dollars upon the claim as set forth in its answer herein; and, second, in decreeing that the city of Galveston, defendant, had and was entitled to a lien to secure the payment of said sum prior to the mortgage to this complainant, and was entitled to be paid said sum out of the proceeds of the sale of the mortgaged property prior to the holders of the bonds secured by the mortgage to this complainant. (2) The court erred in confirming the master's report upon the interventions of D. L. Bates & Bros., Frank Vallat, St. Louis Car Company, G. Herbert Brown, Thiel Detective-Service Company, Kracke & Flanders, Best, Fox & Co., T. L. Cross & Co.,

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R. D. Nutall Company, Westinghouse Electric & Manufacturing Company, F. K. Fisher, Knapp Bros., T. F. Burke, F. E. Homer & Co., Barden-Streets Electrical Construction Company, L. V. Elder, Clarke & Courts, Plomo Specialty Manufacturing Company, Rice, Baulard & Co., Blum Hardware Company, Alex Easton, George A. Christie, Lovejoy & Sampson, Central Electric Company, Paul Shean Sanitary Plumbing & Manufacturing Company, Missouri Car & Foundry Company, Waters-Pierce Oil Company, Dickson Car-Wheel Company, Taunton Locomotive Manufacturing Company, Washburn & Moen Manufacturing Company, J. W. Davis Oil Company, Pratt & Cady Company, Mica Insulator Company, Galveston Dry-Goods Company. J. F. Smith & Bro., Goldmark & Wallace, and George H. Henchman, finding and reporting that under the statutes of the state of Texas each of such interveners had a lien upon, and was entitled to payment out of, the net earnings of the property in the custody of the court through its receiver in this cause, during the receivership herein, superior to the mortgage to this complainant, as trustee, foreclosed herein, and prior to the holders of the bonds secured by the said mortgage, and in overruling the exceptions of this complainant to the master's said report upon each of such interventions. (3) The court erred in confirming the master's report, and overruling this complainant's exceptions thereto, upon the interventions of the Central Electric Company, Paul Shean Sanitary Plumbing & Manufacturing Company, Missouri Car & Foundry Company, J. W. Davis Oil Company, Waters-Pierce Oil Company, Dickson Car-Wheel Company, Taunton Locomotive Manufacturing Company, Washburn & Moen Manufacturing Company, Pratt & Cady Company, Mica Insulator Company, Galveston Dry-Goods Company, J. J. Smith & Bro., Goldmark & Wallace, and G. H. Henchman, and decreeing that the indebtedness thus found to be due said interveners, respectively, was a preferential claim or equitable lien superior and prior in right to that of these complainants, and the holders of the bonds secured by the mortgage to these complainants as trustees, foreclosed herein, upon the earnings and income of the properties in the custody of the court in this cause for its payment and satisfaction, and that said interveners also have a lien, under the statutes of the state of Texas, upon the net earnings of said properties arising whilst under the management and control of the receiver in this cause, for the payment and satisfaction of said claims. (4) The court erred in confirming the master's report, and overruling this complainant's exceptions thereto, upon the intervention of the Lee Iron Works, and decreeing that the indebtedness thus found to be due said intervener was an equitable charge or lien prior and superior in right to the claims of the holders of the bonds secured by the mortgage to this complainant as trustee, and foreclosed herein, upon the properties and effects of the defendant Galveston City Railroad Company, and upon the tolls and income therefrom under the control of the receiver in this cause, as security for its payment, and directing the payment and satisfaction of intervener's said claim out of the proceeds arising from the sale of said properties, and out of the tolls and income therefrom, prior to the bonds secured by the mortgage to this complainant as trustee, and foreclosed herein. (5) The court erred in overruling complainant's exceptions to the master's report upon the intervention of Adoue & Lobit, and in confirming said report and decreeing that said interveners were entitled to recover, etc. (6) The court erred in overruling this complainant's exceptions to the master's report upon the intervention of Buckeye Engine Company, and in confirming said report and decreeing: First, that said intervener has a specific lien, by contract mentioned in said report, for the payment and satisfaction of the indebtedness found to be due said intervener, prior and superior in right to the lien created by the mortgage to this complainant as trustee; second, in foreclosing said specific contract lien upon said two engines prior to the said lien created by the said mortgage to this complainant, and ordering the sale of said engines to satisfy said lien; and, third, in decreeing that, should the proceeds from the sale of said two engines be insufficient to fully pay off and satisfy said claim, the intervener had, to the extent of said deficit, under and by virtue of the statutes of the state of Texas, a lien upon the earnings of the properties in the custody of the court in this cause, arising whilst under the management and control of the receiver in this cause, for the payment and

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satisfaction of the deficit, prior and superior in right to the lien created by the mortgage to this complainant as trustee and the bonds secured thereby; and, fourth, in not decreeing that the mortgage to this complainant as trustee, and foreclosed herein, was a lien upon said engines superior to the specific contract lien given by the defendant company to said intervener, since it appeared that said mortgage to this complainant as trustee was recorded as required by the laws of the state of Texas before the said contract lien given by the defendant to said intervener. (7) The court erred in decreeing that John Grant should be allowed and paid out of the funds in or coming into the custody of the court in this cause, prior to the holders of bonds secured by the mortgage to this complainant as trustee, and foreclosed herein, the sum of seven thousand five hundred dollars, as compensation for his services as special master commissioner appointed to sell the property covered by the mortgage foreclosed herein."

Since this appeal was perfected, the controversy with respect to the claim of Adoue & Lobit has been amicably adjusted and disposed of, and therefore the assignment of error relating thereto is waived.

J. T. Davis and Brainard Tolles, for appellant.

Jas. B. Stubbs, J. W. Terry, John D. Rouse, Wm. Grant, W. S. Hunt, and W. A. Kincaid, for appellees.

Before PARDEE and SHELBY, Circuit Judges, and TOULMIN, District Judge.

TOULMIN, District Judge, after stating the case as above, delivered the opinion of the court.

1. The first question presented on the record for our consideration is, what relation did the city of Galveston sustain towards the Galveston City Railroad Company,—that of stockholder or creditor? The contention of appellant is that the city's relation to and only interest in the railroad company was that of stockholder. The appellee does not insist that, as the result of the contract and mortgage, the city was a part owner in kind of the railroad property, as set up in its answer, or that it was both creditor and stockholder; and the appellee's counsel concedes that if the city's status was that of a stockholder, common or preferred, it was not a creditor. But the contention is that it was a creditor of the railroad company; that "the question is, what was the substance? and not what was the form of the city's status"? To use the language of the court in Corcoran v. Powers, 6 Ohio St. 19, "The question in such cases is not, what did the parties call it? but, what do the facts require the court to call it?" It appears that the city of Galveston passed an ordinance embodying a contract between itself and certain promoters of the Galveston City Railroad Company, whereby the city granted said company the right to construct and operate, for a term of years, railways along and across certain specified streets of the city, upon certain conditions. In the contract it was provided that in lieu of percentage on the net receipts of said railroad, and in lieu of bonus for the contract, 600 shares of the capital stock of said railroad should be made over and transferred to the city of Galveston; said 600 shares of stock to be paid up by said promoters, or by the company to be formed under the contract and franchise. The railroad company was duly incorporated and organized, and 600 shares of the capital stock of the company, of the par value of $50 each, were

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issued as fully paid up stock to the city, as provided by the contract. The city was entered as a stockholder on the books of the company. It was represented on the board of directors by its mayor, who was by agreement elected a director to represent its interest. It had the right to vote in the management of the company, and to share in the distribution of dividends. It was represented at the meeting of the directors by its mayor, who, as one of the directors, participated in said meeting, and voted for the resolution authorizing the issuance, execution, and sale of the bonds and the execution and delivery of the mortgage involved in this suit. The city's stock was a part of the capital stock of the company, and it is clear that it possessed not only the characteristics, but the essential properties, of capital stock. But it is said that the company granted to the city a first lien on its franchise and other property for the security of the city's interest in the company; and it is argued by the learned counsel for the city "that the contract would have been meaningless if this lien obligation was ineffectual to shield the city's rights from the consequences of indebtedness incurred by the company," and it is contended that the city's stock, security, or debt, by whatever name it may be called, "should not become worthless by extinguishment, but should be paid before other claims against the company, thus clearly making it a debt, and placing the city in the attitude of a creditor." A debt is a sum of money due by contract, express or implied. The sum of money may be payable at a fixed time or upon a contingency. When payable upon a contingency, it becomes a debt only when the contingency has happened. Black, Law Dict. 336, and authorities cited in notes. A creditor is one to whom a debt is owing by another person, called the "debtor." Black, Law Dict. 299, tit. "Creditor." "In its strict sense, a creditor is one to whom money is due. In a more general and extensive sense of the term, a creditor is one who has a right to recover money of another on any account whatever." 8 Am. & Eng. Enc. Law (2d Ed.) 239, 240. Where are the facts and circumstances in this case which show that the Galveston City Railroad Company owed to the city of Galveston any sum of money due by contract, express or implied, payable at a specified time or on a contingency? There was no contract by which the city was to receive a percentage on the net receipts of the railroad. There was no contract for a bonus to be paid to the city in consideration of the franchise, rights, and privileges granted by it to the railroad company, which was not to be paid or to become payable until the company allowed itself to become incumbered by debt. If a contract of this character might have been implied by the negotiations of the parties for such rights and privileges, whereby the city became a creditor, it ceased to be such creditor when it entered into the contract which was expressly made by them. That contract provided that:

"Said party [the promoter of the railroads] shall make over and transfer to the city of Galveston, in lieu of percentage on the net receipts of said road, and in lieu of bonus for this contract, six hundred shares of the capital stock of said railroad; said six hundred shares of stock to be paid up by said party, or by the company to be formed under the contract."

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We find no language in this contract to express or imply the relation of creditor on the part of the city. But the language employed whereby the city was to acquire its interest in the company is apt to express the relation of stockholder. The instrument by which the security was given recites the terms of the contract, and, in consideration thereof, creates and grants a lien on the corporate property of the company to secure the interest of the city in the company, in the manner and to the extent provided for in the contract. In our judgment, there was nothing in the contract which placed the city in the attitude of creditor to the company, or clothed it with a single attribute of a creditor, further than in the "sense in which every shareholder is a creditor of a corporation to the extent of his contribution to the capital stock." In the case of Hamlin v. Railroad Co., 24 C. C. A. 271, 78 Fed. 664, 36 L. R. A. 826, the court said:

"There is a sense in which every shareholder is a creditor of the corporation to the extent of his contribution to the capital stock. In that sense every corporation includes its capital stock among its liabilities. But that creditor relation is one which exists only between the corporation and its shareholders. It is a liability which is postponed to every other liability, and no part of the capital stock can be lawfully returned to the stockholders until all debts are paid or provided for. The violation of this well-understood principle is a breach of trust, and a creditor affected thereby may pursue the stockholders and recover as for an unlawful diversion of assets."

What, then, was the interest of the city which the company undertook to secure? It seems to us clear that it was its interest as a stockholder. When a corporation is dissolved by consolidation with another, or becomes involved in debt and concludes to stop operations and pay its debts, if there are any assets left after paying off the debts they are ordinarily distributed between the stockholders in proportion to the number of shares which each holds. There is no preference of one stockholder over other stockholders, except such preference is expressly contracted for. A preference as to capital stock or a distribution of net assets may be expressly contracted for. Such preferred stockholders, however, are not creditors of the corporation, but are stockholders entitled to a preference over the holders of common stock. Cook, Stocks & S. § 270; Clark, Corp. 367; Coulter v. Robertson, 57 Am. Dec. 168; Hamlin v. Railroad Co., supra. We think the interest of the city of Galveston in the Galveston City Railroad Company was one capable of being secured, and that the evident purpose of the company in providing security for that interest was to give the city a preference in the distribution of the capital stock or net assets of the company over other stockholders. It will not be presumed that the purpose of the company was to make a contract by which the city was to receive the par value or any part of its stock before all the debts of the company are paid. It would require the clearest language to show that such was its purpose. Our interpretation of the contract fails to disclose any such purpose. But, if it existed, the contract would be contrary to public policy and void. Cook, Stocks & S. §§ 271–278; Warren v. King, 108 U. S. 389, 2 Sup. Ct. 789, 27 L. Ed. 769;

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Hamlin v. Railroad Co., supra; Miller v. Ratterman, 47 Ohio St. 141, 24 N. E. 496. In Warren v. King, supra, the court said:

"One of the characteristics of capital stock is that no part of the property of a corporation shall go to reimburse the principal of capital stock until all the debts of the corporation have been paid."

And in Hamlin v. Railroad Co., supra, the court said:

"There is a wide difference between the relation of a creditor and a stockholder to the corporate property. One cannot well be a creditor as respects creditors proper, and a stockholder by virtue of a certificate evidencing his contribution to the capital of the corporation. Stock is capital, and a stock certificate but evidences that the holder has ventured his means as a part of the capital. It is a fixed characteristic of capital stock that no part of it can be withdrawn for the purpose of reimbursing the principal of the capital stock until the debts of the corporation are paid. * * * If the purpose in providing for these peculiar shares was to arrange matters so that under any circumstances a part of the principal of stock might be withdrawn before the discharge of all corporate debts, the device would be contrary to the nature of capital stock, opposed to public policy, and void as to creditors affected thereby."

Our opinion is that the first assignment of errors is well made, and it is sustained.

2. The master reported numerous claims as simple or ordinary debts, which he held could not be classified as preferential claims or liens over that of the mortgage bondholders, upon the property or earnings of the defendant railroad company in the custody of the court, as they were without equitable liens thereon; but he held that the interveners had a lien, under the statutes of the state of Texas, upon the net earnings of the corporation, while in the hands of the receiver, for the payment of their said claims, prior and superior in right to the mortgage bondholders. To the master's report the appellant duly filed exceptions. The exceptions were overruled by the court, the report confirmed, and decrees rendered accordingly. This action of the circuit court presents the question whether the statutes of the state of Texas providing for the appointment of receivers, defining their powers and duties, and regulating proceedings under such appointment (Rev. St. Tex. arts. 1472, 1489, 1490), are applicable to receivers in the federal courts.

This court in the case of Bank v. Ewing, 43 C. C. A. 150, 103 Fed. 168, said:

"We do not think that either the laborers' lien law, or article 1472 of the Revised Statutes of Texas, regulating the distribution of funds that may come into the hands of a receiver of a state court, should or can be construed to have application to the classification of claims and priority of liens accruing against receivers appointed by the courts of the United States."

While the language quoted was used in reference to article 1472 of the statutes, and as applicable to the claim of an employé in the immediate service of the receiver, we can perceive no reason why it is not equally applicable to a claim existing against the corporation at the time the receiver was appointed, the payment of which is sought to be made from the earnings of the corporation while in the hands of the receiver, as provided by article 1490 of the statutes; that being the article under which the claims in question in this

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case were allowed as prior in right to the mortgage bondholders. Article 1490 is as follows:

"All judgments, claims or causes of action when determined, existing against any corporation at the time of the appointment of a receiver, shall be paid out of the earnings of such corporation while in the hands of the receiver, to the exclusion of mortgage action; and the same shall be a lien on such earnings."

Both articles are a part of a system of receiverships established by the legislature of Texas, and both relate to the distribution of funds that come to the hands of a receiver. Some of the provisions of this statute are admittedly not applicable to receivers and to proceedings under the appointment of receivers in the courts of the United States. It can hardly be supposed that the legislature intended some of the provisions of the same statute to apply to receiverships in the courts of the United States, and others not to apply. It will be observed that article 1490 creates no lien on the corpus of the property of the corporation in favor of claims existing against the corporation at the time of the appointment of a receiver, but gives a lien on the earnings of the corporation while in the hands of a receiver. Shall it be assumed that the legislature of Texas undertook to give a lien on funds in the custody of the federal courts, and to regulate the distribution of such funds by the receivers of those courts? We think not. However, it is needless to further pursue this discussion. The court of last resort of the state of Texas has interpreted the statutes in question. We follow the interpretation given to the statutes of a state by the supreme court of that state. First Nat. Bank v. Chehalis Co., 166 U. S. 440, 17 Sup. Ct. 629, 41 L. Ed. 1069; Nobles v. Georgia, 168 U. S. 398, 18 Sup. Ct. 87, 42 L. Ed. 515. In Fordyce v. Du Bose, 87 Tex. 78, 26 S. W. 1050, the supreme court of Texas said:

"The several acts of the legislature upon the subjects of receiverships do not purport by their language to affect receivers appointed by the federal courts in their official capacity, and courts will construe them so as to embrace such subjects as the legislature had the authority to legislate upon. These acts were not intended to affect the procedure of federal courts as to receivers appointed by such courts."

We fully concur in this opinion.

The decree of the circuit court confirming the master's report upon the interventions specifically set out in the second assignment of errors, and decreeing that under and by virtue of the statutes of Texas the interveners had a lien upon, and were entitled to payment out of, the net earnings of the property while in the hands of the receiver, prior and superior in right to the complainant and the holders of the bonds secured by the mortgage herein foreclosed, should be reversed.

3. The master reported a number of claims as preferential and entitled to an equitable lien, superior in right to that of the mortgage bondholders, upon the earnings of the receivership. Exceptions were duly filed to the report, which the court overruled, and in all respects confirmed the master's report, and entered decrees accordingly. "A court of equity engaged in administering mort-

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gaged railroad property under a receivership in a foreclosure suit may prefer unpaid claims for current expenses of the ordinary operation of the railroad, incurred within a limited time before the receivership, to a prior mortgage lien, in the distribution of the income or of the proceeds of the mortgaged property." Bank v. Doud (C. C. A.) 105 Fed. 123;[2] Southern R. Co. v. Carnegie Steel Co., 176 U. S. 257, 20 Sup. Ct. 347, 44 L. Ed. 458; Lackawanna Iron & Coal Co. v. Farmers' Loan & Trust Co., 176 U. S. 298, 20 Sup. Ct. 363, 44 L. Ed. 475. The supreme court, in the cases cited, have, in effect, declared that, before an unsecured creditor can be accorded a preference over mortgage creditors in the distribution of net earnings in the hands of a receiver of a railroad, it should reasonably appear from the circumstances, including the amount involved and the terms of payment, that the debt was one fairly to be regarded as part of the operating expenses of the railroad, incurred in the ordinary course of business, and to be met out of current receipts. A creditor is not entitled to such preference and priority simply because that which he furnished to the railroad company prior to the appointment of the receiver was for the preservation of the property and for the benefit of the mortgage security. That, however, is an important element in the matter in considering the equity of the claim. The circuit court of appeals of the Eighth circuit, in the case of Bank v. Doud, supra, after an exhaustive "examination and analysis of the facts and opinions in all the cases in the supreme court upon the subject of preferential claims in suits to foreclose mortgages of quasi public corporations," said the decisions of the supreme court will be found to assert the proposition that "the class of claims which may be awarded a preference in payment over the prior mortgage debt in equity is limited to claims for current expenses incurred in the ordinary course of the operation of the mortgaged property within a limited time before the appointment of a receiver." It appears from the record that there was no diversion of the current income from the payment of current expenses to the payment of interest on the mortgage debt, or to the permanent improvement of the mortgaged property. Hence the only question for us to determine here is whether there is error in the decree of the circuit court adjudging the claims now under consideration to be preferential claims, with an equity superior to the lien of the mortgage. Our opinion is there is no error in the decree, except as to the claims of the Dickson Car-Wheel Company, the Lee Iron Works, and a portion of the claim of the Paul Shean Sanitary Plumbing & Manufacturing Company. The claim of the Dickson Car-Wheel Company was for Barr motor wheels sold to the defendant railroad company on September 18, 1896, and used by the company on its cars. The amount involved is $14. The sale was presumably for cash,—nothing appears on the record to the contrary,—and it was made more than a year before the bill in this cause was filed. The claim of the Lee Iron Works appears to have been for labor performed and material furnished for the railroad company from Decem-

[2] 44 C. C. A. 389.

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ber, 1895, to April, 1896, for which promissory notes were given at the time, payable at short intervals, and renewed from time to time, resulting finally in three notes, which fell due subsequent to the filing of the bill herein. The labor and material furnished were in connection with the railroad company's track, overhead line, engines, boilers, and cars. The claim of the Paul Shean Sanitary Plumbing & Manufacturing Company is for $743.05, for material furnished the railroad company in the necessary repair of the engine in its power house employed to generate the electricity by which its cars were propelled. Some of the material was furnished from time to time from July, 1895, to February, 1896, for which a note was given, and on which a partial payment was subsequently made and a new note given. Other material was furnished in March, 1896, for which a note was given, a partial payment afterwards made on it, and a new note given for the balance. Forty-three and 5/100 dollars of the claim is an open account for material furnished in September and October, 1897, a short time before the bill was filed and the receiver appointed herein. We think the Paul Shean Company's claim to the extent of $43.05, only, should be allowed. The balance of the claim does not, in our opinion, come within the doctrine declared by the supreme court, hereinbefore referred to. We, however, think that all the other claims decreed by the circuit court to be preferential claims, with a superior equity to the mortgage, do come within that doctrine, and that they should be so allowed. They were for current expenses incurred in the ordinary course of business, and may be fairly regarded as part of the operating expenses of the railroad. They accrued within five or six months before the appointment of the receiver.

4. It appears that the intervener the Buckeye Engine Company on September 16, 1892, made a contract with the defendant the Galveston City Railroad Company under which it sold to the defendant two engines and certain boilers and other machinery, the purchase price of which was $15,000, and for which the railroad company executed certain promissory notes. Some of the notes were paid, leaving the balance, aggregating $7,500, unpaid. By the original contract it was stipulated that the engines and boilers were to remain the property of the intervener until full payment therefor is made. The machinery was delivered and placed in position in March and April, 1893. The contract was filed in the proper office for registration on August 9, 1893. The intervener sought to fix the mechanic's lien on the property. The master held that said claim of lien was not well founded, but held that:

"By virtue of the reservation by the intervener of title to the aforementioned machinery until fully paid for, and the act of the legislature of Texas (Acts 1885, p. 76) declaring that all such reservations shall be held to be chattel mortgages, and by virtue of the fact that the said machinery was not delivered until after the mortgage under which the complainant claims had been executed, and that when delivered it carried with it the burden of the lien reserved by the intervener, the said intervener has a specific lien upon said two Buckeye engines for the payment and satisfaction of its said claim, prior and superior in right to the lien thereon created under and by virtue of said mortgage."

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No exceptions to the master's report were filed by the intervener, but exceptions to the report were duly filed by the appellant, complainant below, which were overruled, and the report confirmed by the court.

The statute of Texas provides that:

"All reservations of the title to or property in chattels as security for the purchase money thereof, shall be held to be chattel mortgages, and shall, when possession is delivered to the vendee, be void as to creditors and bona fide purchasers, unless such reservations be in writing and registered as required of chattel mortgages: provided, that nothing in this law shall be construed to contravene the landlord and tenant act." Article 3327, Rev. St. Tex.

The supreme court of Texas, in Harling v. Creech, 88 Tex. 300, 31 S. W. 357, held that the effect of the statute was to forbid conditional sales of personal property, or, rather, to convert all such contracts into chattel mortgages, and required registration of them to protect creditors and bona fide purchasers of the property.

The statute providing for registration of chattel mortgages is as follows:

"Every chattel mortgage, deed of trust or other instrument of writing intended to operate as a mortgage of or lien upon personal property which shall not be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the property mortgaged or pledged by such instrument, shall be absolutely void as against the creditors of the mortgagor or person making the same, and as against subsequent purchasers and mortgagees or lien holders in good faith, unless such instrument, or a true copy thereof, shall be forthwith deposited with and filed in the office of the county clerk of the county where the property shall then be situated, or if the mortgagor or person making the same be a resident of this state, then of the county of which he shall at the time be a resident." Article 3328, Rev. St. Tex.

The circuit court held, in effect, that the intervener had a chattel-mortgage lien by virtue of the contract in question, and decreed that it had a specific lien on said engines which was superior to that of the appellant's mortgage. In this we think the court erred. Both mortgages were subject to the registration laws of the state of Texas. The lien first registered as provided by those laws is superior. The record shows that the chattel mortgage was recorded on August 9, 1893, while the mortgage to appellant was recorded on May 27, 1893. The only ground, as appears from the report of the master, on which he based his ruling, and presumably the only ground on which the court sustained that ruling,—no other being disclosed by the record,—is that the engines were not delivered until after the mortgage under which the complainant (appellant) claims had been executed, and that when delivered it carried with it the burden of the lien reserved by the intervener. While the mortgage to appellant is dated January 1, 1893, it was not signed in the presence of and attested by subscribing witnesses, and it was not acknowledged until May 13, 1893. Rev. St. Tex. art. 630, provides that:

"Every deed or conveyance of real estate must be signed, or acknowledged, by the grantor in the presence of at least two credible subscribing witnesses thereto, or must be duly acknowledged before some officer authorized to take acknowledgments and properly certified to by him for registration."

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"To convey title, it is necessary to deliver a completed deed." 9 Am. & Eng. Enc. Law (2d Ed.) 150; Walker v. Renfro, 26 Tex. 142; Railroad Co. v. Garrett, 52 Tex. 133; Tuttle v. Turner, 28 Tex. 759. A deed takes effect at the time of its delivery. Tuttle v. Turner, supra. "The law presumes, in the absence of evidence to the contrary, that the date of the deed is the date of delivery," but "this presumption is disputable, and the time of delivery may always be proved." 9 Am. & Eng. Enc. Law (2d Ed.) 153.

It does not appear when appellant's mortgage was delivered. There is no evidence on the subject. There are a number of authorities to the effect that when acknowledgment is essential to the validity of a deed, and the date of the acknowledgment differs from the date of the deed, the deed was delivered at the date of the acknowledgment. 9 Am. & Eng. Enc. Law (2d Ed.) 152, 153, and authorities cited in note. Under the statute of Texas, a conveyance is not effective unless it is signed in the presence of and attested by two subscribing witnesses, or is acknowledged. The mortgage in question was not attested by witnesses, and was not acknowledged until May 13, 1893, which was subsequent to the delivery of the engines. It was not a completed deed until acknowledged. Under the statute of Texas, in the absence of attestation by witnesses acknowledgment is essential to the validity of the mortgage. The date of the acknowledgment of the mortgage differing from the date of the mortgage, we hold the mortgage to have been delivered at the date of its acknowledgment. The record shows that the engines were delivered and placed in position, and had become permanently a part of the railroad property, before appellant's mortgage became effective, on May 13, 1893. But, if the engines be treated as after-acquired property, appellant's mortgage covered all property then owned or to be thereafter acquired by the railroad company; and, under the rule well settled by the decisions of the supreme court, such mortgage created a lien which could not be displaced by the contract under which the engines were furnished, although it contained the stipulation that the title to the engines should not pass until they were fully paid for. Porter v. Steel Co., 122 U. S. 267, 7 Sup. Ct. 741, 30 L. Ed. 1210; Railroad Co. v. Hamilton, 134 U. S. 296, 10 Sup. Ct. 546, 33 L. Ed. 905; also, Phœnix Iron-Works Co. v. New York Security & Trust Co., 54 U. S. App. 408, 28 C. C. A. 76, 83 Fed. 757. No part of intervener's claim was for operating expenses or repairs. No part of it was for keeping a completed road in operation, either in the way of labor or material. But it accrued in the construction of a plant, which was a part of the railroad system. Railroad Co. v. Hamilton, supra; Wood v. Safe-Deposit Co., 128 U. S. 416, 9 Sup. Ct. 131, 32 L. Ed. 472. But it seems to us that no equitable principles are involved in intervener's claim. We think that the question at issue turns upon the legal rights of the parties under the registration laws of the state of Texas. The intervener having failed to record its chattel mortgage until after appellant's mortgage was recorded, it lost its priority, if it ever had any.

5. The award of $7,500 to the special master commissioner as compensation for his services in selling the mortgaged property under

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the decree of foreclosure is complained of by appellant as unreasonable and excessive. There was no reference had by the circuit court to ascertain what would be reasonable and just compensation to the special master commissioner, and it does not appear that any evidence on the subject was introduced before the court. Questions of this sort rest largely in the discretion of the circuit court, and are rarely interfered with on appeal; but, as this cause must be reversed and remanded, the circuit court is directed to order a reference to ascertain what would be reasonable compensation to be allowed said special master commissioner, and that all parties interested be duly notified of the time and place of holding said reference, and be permitted to submit evidence in the matter if they see fit to do so. Reversed and remanded to the circuit court, with instructions to enter a decree in accordance with the views herein expressed.

(107 Fed. 325.)

CITY OF GALVESTON v. GUARANTY TRUST CO. OF NEW YORK et al.

(Circuit Court of Appeals, Fifth Circuit. March 19, 1901.)

No. 968.

1. STREET RAILROADS—SPECIAL ASSESSMENT—MUNICIPAL TAX—LIMITATIONS.
   A special assessment against a street-railroad company for improving the portion of the street occupied by its track is not a tax, within Rev. St. Tex. art. 5212b, prohibiting a delinquent municipal taxpayer from pleading limitations against the payment of "any taxes" due from him to the city.
2. SAME—ACTION BASED ON WRITTEN CONTRACT—LIMITATIONS.
   Rev. St. Tex. arts. 3354–3356, provide that there shall be commenced and prosecuted, within two years after the cause of action accrues, and not afterwards, all actions for debts not evidenced by contracts in writing, and a longer time is fixed for debts founded on written contracts. *Held*, that the charter of a city railroad company, which authorized it to construct and operate its lines under such conditions and ordinances as the city might provide and impose, was not a contract in writing within such statute, on which a special assessment against the company for a street improvement, subsequently authorized by the legislature, was founded, as the contract mentioned by the statute is a contract between the parties, and the city was not a party to the company's charter, which was solely between the latter and the state, and hence the two-years limitations applied to actions for such assessments.
3. SAME—ACCRUAL OF CAUSE OF ACTION.
   A cause of action against a city street-railroad company on a special assessment for a street improvement accrued, within the meaning of the statute of limitations, when the improvement was completed and accepted by the city council, as the city charter expressly provides that assessment for such improvements shall become due at that time.

Appeal from the Circuit Court of the United States for the Eastern District of Texas.

Jas. B. Stubbs, for appellant.

J. T. Davies, R. S. Lovett, Brainard Tolles, John D. Rouse, Wm. Grant, and W. S. Hunt, for appellees.

Before PARDEE and SHELBY, Circuit Judges, and TOULMIN, District Judge.

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TOULMIN, District Judge. This is an appeal by the city of Galveston, as an intervener, in the suit of Guaranty Trust Co. of New York v. Galveston City R. Co. (one branch of which has just been disposed of by this court, No. 969 on the docket of the court) 107 Fed. 311.[1] In addition to the facts set forth in that case, and which need not be repeated here, it may be stated that the intervener claimed that the said railroad company was indebted to it for one-third of the cost of grading, filling, and paving certain streets and avenues in the city of Galveston upon which the railroad company had its track, and that the debt was secured by a lien upon the company's property and franchises and their proceeds, in the custody of the court, prior in time and right of payment to the other liens asserted in the suit. This claim was based mainly upon the requirement in the railroad company's act of incorporation and its amendment of October 8, 1866, and February 9, 1891, which provide that "said company shall construct, equip and run said railroads upon the streets within the limits of said city, under such conditions and ordinances as the mayor and aldermen of said city may provide and impose," and upon the authority which the city had, under the laws of Texas and under its charter, to collect from the railroad company a part of the expense of improving the streets which it used and occupied with its lines. The city's charter gives the council of the city the exclusive control and power over its streets and highways. In 1887 it was amended by authorizing the council to regulate, control, and direct the construction of street-railway tracks, and, among other things, "to compel street-railway companies to pay the actual cost of filling and grading, or filling, grading and paving the streets between their rails in all cases where the same may be filled and graded, or filled, graded and paved by the city." On March 31, 1891, and after the railroad company had effected the last amendment to its charter, and after it had constructed and was operating its railroad, the charter of the city was changed so as to enlarge the liability of street-railway companies, and to require them to pay one-third of the cost of paving or otherwise improving any street or avenue upon which they owned or operated a railway, and a lien against the roadbed, ties, rails, fixtures, rights, and franchises of such companies was authorized to be fixed and imposed to secure such improvements. The intervention was referred to the master, who reported fully and at length the material facts, and found that the city's claim was barred by the statute of limitations of two years, and for that reason the city was not entitled to recover. The counsel for the intervener contended that the defense of limitation should not prevail, because its claim was in the nature of a tax imposed by the city upon the railroad company, and the Revised Statutes of Texas provide that no delinquent taxpayer shall have the right to plead in any court any statute of limitation by way of defense against the payment of any taxes due by him to the city, etc. Article 5212b, Rev. St. Tex. The master held that the phrase "any taxes," employed in the statute, did not

[1] 46 C. C. A. 305.

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extend to or embrace assessments such as are claimed in this suit. The city excepted to the master's report. The exceptions were overruled, and the city appealed.

The specifications of error assigned are that the court erred in holding that the assessments claimed were not taxes, within the meaning of article 5212b, Rev. St. Tex.; and that the court erred in holding that the claim was barred by the statute of limitations of two years.

A part of the claim sued on accrued December 7, 1893, the balance April 1, 1895, and the intervention was filed November 10, 1897. The assessments sued for in this intervention were not taxes, within the meaning of article 5212b, Rev. St. Tex.; Higgins v. Bordages, 88 Tex. 458, 31 S. W. 52, 803; Taylor v. Boyd, 63 Tex. 533; Allen v. City of Galveston, 51 Tex. 302; Hutcheson v. Storrie, 92 Tex. 685, 51 S. W. 848, 45 L. R. A. 289. The Texas statutes of limitations provide, among other things, that there shall be commenced and prosecuted, within two years after the cause of action shall have accrued, and not afterwards, all actions for debt where the indebtedness is not evidenced by a contract in writing; and that all actions for debt, where the indebtedness is evidenced by or founded upon any contract in writing, shall be commenced and prosecuted within four years after the cause of action shall have accrued, and not afterwards. Rev. St. Tex. arts. 3354–3356.

The counsel for the appellant concedes that, if the indebtedness here claimed is not evidenced by, or founded upon, a contract in writing, then the statute of limitations of two years applies. But his contention is that it is evidenced by, or founded upon, a contract in writing, in that the charter of the railroad company provided that "said company shall construct, equip and run said railroads upon the streets within the limits of said city under such conditions and ordinances as the mayor and aldermen of said city may provide and impose," and while the claim may not be evidenced, as to amount, by the charter of the company, it is founded upon it, and said charter is a contract in writing.

While the charter of the company was a contract, it was such only between the state and the company, and its subject-matter was the franchises and rights which the company were authorized to exercise under it. The city was not a party to it. By the terms of its charter, the company undertook to comply with the conditions and ordinances which the city council may prescribe, but at that time the city had no legislative authority to improve its streets, and assess the railroad company with one-third of the cost of the improvements. The city subsequently obtained legislative authority to make such improvements, and to assess one-third of the cost thereof to any railroads using the streets. Under this authority, by subsequent ordinances, it improved the streets on which this railroad company was operating, and assessed one-third of the cost to the company, but we are unable to see how such assessment became a debt evidenced by, or founded upon, a "contract in writing"; the contract being the charter of the company granted by the state, to which the city, as we have said, was not a party. The contract in writing mentioned in the statute is a contract between the parties; those occupying to-

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wards each other a contract status,—a "privity." The debt mentioned in the statute as a debt evidenced by a contract in writing is one proved by an instrument in writing importing on its face the existence of the debt, and a debt founded upon a contract in writing is one for the establishment of which such contract is essential. In our opinion, the assessment debt in question bears no such relation to the charter of the railroad company.

Under the city's charter, all assessments for street improvements became due "whenever and as soon as such improvements are completed and accepted by the city council." It appears that they were completed and accepted, and the assessment in this case made, more than two years before this suit was brought. Our opinion is the cause of action then accrued, that it was an open unliquidated claim, and that it was barred before this suit was commenced. Lewis v. Houston, 11 Tex. 642. The decree of the circuit court is affirmed.

(107 Fed. 328.)

MANHATTAN TRUST CO. v. TRUST CO. OF NORTH AMERICA.

(Circuit Court of Appeals, Eighth Circuit. February 25, 1901.)

No. 1,480.

1. JUDGMENT—MATTERS CONCLUDED BY DECREE.

A petition in intervention was filed in a railroad foreclosure suit setting up a claim for rental of terminal property against the defendant accruing prior to the appointment of receivers in the suit, on account of which the intervener claimed a statutory landlord's lien, and also that its claim constituted a preferential debt in equity entitled to priority over the debt of the mortgagee as a part of the necessary expenses of operating the road. Issue was joined on both such claims, and on a hearing the petition was dismissed on the merits, and the decree of dismissal was affirmed on appeal. Subsequently, the receiver having accumulated a fund in the registry of the court from the earnings of the road, the intervener filed an amended petition asserting its equitable right to preferential payment from such fund. *Held*, that the former decree was conclusive against its right to maintain such petition, the claim made, as well as the right in which it was asserted, in the two petitions being identical, and one which, had it been sustained in the first proceeding, would have been a charge upon the same fund when subsequently earned.

2. SAME.

A decree on the merits is conclusive upon all the issues joined by the pleadings, and its effect as a prior adjudication is not changed by the fact that one of such issues was not discussed in the opinion of the court.

Appeal from the Circuit Court of the United States for the Northern District of Iowa.

For former opinion, see 102 Fed. 710.

Craig L. Wright (Strong & Cadwalader, Call & Hubbard, and George W. Wickersham, on the brief), for appellant.

James L. Kennedy and F. C. Farr (T. F. Bevington, on the brief), for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

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CALDWELL, Circuit Judge. On the 28th day of September, 1893, the Manhattan Trust Company, as trustee in a mortgage executed by the Sioux City & Northern Railroad Company on its road and appurtenances, filed its bill of complaint against the railroad company praying for the appointment of a receiver to take the charge and management of the mortgaged property for the preservation of the same and the protection of the rights of the mortgagee. Receivers were appointed accordingly. On the 11th day of July, 1894, a supplemental and amended bill of complaint was filed in the cause, praying for the appointment of receivers and the foreclosure of the mortgage executed to the complainant by the Sioux City & Northern Railroad Company on its railroad and appurtenances, and receivers were accordingly appointed under this bill, and a decree of foreclosure rendered, and the property sold in conformity therewith. While operated by the receivers, the road earned certain moneys now in the registry of the court. At the time the receivers' accounts were approved and the property turned over to the purchasers at the foreclosure sale, the court made the following order touching the moneys referred to:

"And it appearing to the court that all claims against the receivers of the said Sioux City & Northern Railroad have been paid or adjusted except the claims of the Trust Company of North America for rental of the terminals, which claim is pending, but not yet determined, it is further ordered, adjudged, and decreed that, subject to the said claim, the lien of the complainant as trustee for the bondholders is hereby established against all the remaining funds in the registry of the court derived from the special master and the said receivers. It is further ordered that hearing on the claims of the Trust Company of North America be postponed until a later date, to be fixed by the court."

On the 18th day of December, 1893, the Trust Company of North America filed its original petition of intervention in the cause, and on September 24, 1894, its amended petition of intervention. This first amended petition of intervention and the proceedings had thereon, and the second amended petition, upon which the decree now appealed from was entered, are, in the view the court takes of this case, the only portions of the record necessary to be particularly considered. On the 14th day of December, 1889, the Sioux City & Northern Railroad Company leased from the Sioux City Terminal Railroad & Warehouse Company certain grounds, tracks, and terminal facilities at Sioux City, for which the railroad company agreed to pay rent at the rate of $90,000 annually, payable quarterly. The intervener succeeded to the rights of the lessor under this lease. The first amended petition of intervention alleged "that the Sioux City & Northern Railroad Company neglected and failed to pay the rental under the said lease from and after the 14th day of June, 1893, but continued to use the premises demised," and sought to have the rent due from the railroad company under the lease from the date mentioned until the appointment of the receivers under the bill of foreclosure declared to be prior and superior to the lien of the mortgage of the complainant, the Manhattan Trust Company. This claim was rested upon two grounds: First, that the intervener was entitled to a landlord's lien, under the statutes of Iowa, on the

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rolling stock and equipments of the railroad, for the rent of the terminals under the lease; and, second, that it was "entitled as a matter of equity" to have the rentals under the lease "considered a part of the expenses of the receivership, and be declared a prior and superior lien to the lien of the trust deed to the Manhattan Trust Company." The petition concluded with the prayer that the rent claimed "may be declared to be a proper part of the receivers' expenses to be applied to the payment of any deficiency that may exist in payment of the bonds secured by the trust deed to your orator after foreclosure of the said trust deed, and that all of the said claims and demands be declared to be prior and superior to the trust deed given to the complainant, the Manhattan Trust Company, and that the complainant may have such other and further relief as may to justice and equity appertain." The answer of the Manhattan Trust Company to this amended petition of intervention denied that the intervener had a landlord's lien on the rolling stock and equipments of the railroad for the rent under the lease, and denied that the intervener was entitled to have the rentals due under the lease from and after the 14th day of June, 1893, considered "as a part of the expenses of the receivership, or declared a prior or superior lien to the lien of the trust deed to the Manhattan Trust Company." The cause, upon this petition of intervention, went to final hearing on the 21st day of June, 1895, and it was on that day "ordered and decreed that the intervening petition and amended petition of the Trust Company of North America be, and the same is hereby, dismissed upon the merits as to the Manhattan Trust Company." The opinion of the circuit court is reported in 68 Fed. 72. From this decree the intervener appealed to this court, making, among others, the following assignment of error:

"The court erred in refusing to this intervener an equitable lien for the rents accruing within six months prior to the date of the appointment of the receivers on the application of the complainant, which holding was erroneous for the reason that the property embraced in the lease was a necessary and integral part of the railroad system, furnishing its only terminal facilities at Sioux City, and necessary to the successful operation of the road; and the use of said terminal properties was for the benefit of all persons having an ownership in this railroad through the ownership of either bonds or stock; and because it is contrary to the equitable rule allowing priority in favor of labor and other necessaries furnished a short time prior to the appointment of a receiver."

This court affirmed the decree of the lower court. 23 C. C. A. 30, 77 Fed. 82. On the 15th day of January, 1900, the intervener filed an amendment to its petition and amended petition of intervention previously filed, prefacing the amendment as follows:

"Your petitioner, the Trust Company of North America, having heretofore been permitted to file its petition of intervention on the 18th day of December, 1893, and an amendment thereto on the 24th day of September, 1894, and being now permitted to amend said petition of intervention and the amendment thereto, further states: * * *"

This amendment sets out the sale of the mortgaged property under the decree of foreclosure, and the fact that there is a fund in the registry of the court accumulated by the receivers from the earn-

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ings of the road, and prays that the same may be applied towards the payment of the rentals accruing under the lease as the same are set out and claimed in the first amended petition of intervention, and for the very same period mentioned therein, namely, from the 14th day of June, 1893, until the appointment of the receivers under the complainant's amended bill asking for a foreclosure of its mortgage. Answering this last amended petition of intervention, the Manhattan Trust Company sets up the proceedings had on the original and amended petition of intervention and the decree dismissing the same on the merits, and "avers that said Trust Company of North America is also estopped by reason of said judgment and decree had under its said intervening petition and amended intervening petition from claiming or asserting any equitable or other lien or claim to any funds in the registry of this court, for that said trust company in said petition claimed an equitable lien and priority for its claim over the lien of this answering complainant under its trust deed, and was adjudicated to have no such claim or lien; and said Trust Company of North America is now estopped by reason of said adjudication from claiming any lien or asserting any claim which it then had or claimed to have against this answering complainant on any grounds then made, or for any reason that it might have had for said claim, and said adjudication stands and remains a finality, and is unreversed." The issue raised by this averment in the answer is the only one we find it necessary to consider. The claim for rents set up in the first amended petition is identically the same, and for the same period, as that set up in the second amendment, and the right to the relief sought is rested on one of the grounds relied upon in the first amendment, namely, that, although the rent accrued before the filing of the bill for foreclosure and the appointment of the receivers thereunder, the intervener is entitled as a matter of equity to have its claim therefor for the period mentioned treated as a part of the expenses of the receivership, and declared a prior and superior lien to the lien of the mortgagee on the fund in the registry. In other words, the intervener bases its claim to the fund upon the ground that it is in equity what in railroad foreclosure suits has come to be known as a preferential debt, and this was one of the grounds for relief set up in the first amended petition, and which was in issue on the pleadings in that case, when, upon final hearing, it was "dismissed upon the merits." The ground upon which the intervener rests its claim under the present petition is that its claim for rent is a preferential debt, prior and superior to the lien of the mortgage, and that the like prior right or lien extends to the fund in court accumulated by the receivers. It is perfectly apparent that the parties, the cause of action, and the ground of recovery thereon are the same in both petitions. No change has taken place in the rights of the parties. Their attitude towards each other is the same. In its first amended petition the intervener asserted its claim for rent was prior and superior to the mortgage upon the same ground that it now asserts a prior and superior claim to the fund in court. The fact that the present fund had not then been earned and paid into court has no

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significance. A decree such as the intervener sought to obtain by its first amended petition would have given it a right prior and superior to the mortgagee to the earnings and income of the road then or thereafter accumulated by the receivers. Such a decree would have given to the intervener's claim for rent the status of a preferential debt, which is precisely what is sought, and all that is sought, by the present petition. A decree that the intervener's claim for rent was a preferential debt, and as such prior and superior to the mortgage debt, would have fixed irrevocably the rights of the parties to any fund then or thereafter coming into the registry of the court applicable to the payment of such claims, and would have entitled the intervener to the fund now in court to the extent of its claim as of course, and without any other proceeding whatever. A proceeding to establish a right to a fund to be accumulated from a particular source and a proceeding to establish a right to that same fund after it has been accumulated are the same. It is vain, therefore, to contend that the cause of action is not the same in both suits. But, assuming this to be so, the intervener's contention is that the issue arising upon the equitable ground of recovery set up in his first amended petition was not considered or passed upon by the court, but that the case was decided and the petition dismissed on another ground. In proof of this contention we are referred to the opinion of the lower court and of this court in the first case, from which it appears the only right of recovery considered by each court in its opinion was that based on the alleged landlord's lien, and that no mention was made of the equitable lien set up and relied upon in the petition as one of the grounds of relief, the denial of which by the lower court was assigned for error. But this fact in no way militates against the conclusiveness of the estoppel arising from the former adjudication apparent upon an inspection of the record. When the plaintiff rests his claim for relief in his bill on two or more grounds, and his bill is dismissed generally on its merits, he is thereafter estopped from maintaining a second bill seeking the same relief upon one of the grounds set up in his first bill and in issue under the pleadings. A judgment or decree rendered upon the merits constitutes an absolute bar to a subsequent action on the same claim or demand, and it is no answer to the plea of estoppel in such a case to say the court did not, in its opinion, consider the particular ground of relief. Its decree dismissing the bill on its merits covers all the grounds for relief set up in the first bill and put in issue by the pleadings as fully and effectually as if they had been specifically named in the court's opinion. Any other rule would make litigation interminable. As long as a party could show that the court, in its opinion, took no notice of one of its alleged grounds for relief, he could file a new bill seeking the same relief sought by his first bill on that ground, and so on as long as any one of the grounds of relief set up in his first bill was not discussed, and in terms decided against him, in the opinion of the court. The rule is more comprehensive than we have stated, and goes further than is necessary to bar the present suit. It is enough to bar the second suit that

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the same grounds of recovery might have been set up and relied on in the first suit. "The language, therefore," says the supreme court in Cromwell v. Sac County, 94 U. S. 351, 24 L. Ed. 195, "which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate when applied to the demand or claim in controversy. Such a demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever." In Southern Minnesota Ry. Extension Co. v. St. Paul & S. C. R. Co., 5 C. C. A. 249, 55 Fed. 690, this court, speaking by Judge Thayer, in sustaining the conclusive effect of a former judgment between the same parties to the suit, used the following language:

"The appellant might have pleaded in the former action the same grounds of recovery which it now relies on, and, if it did not do so, it cannot take advantage of such neglect. It will not be allowed in this suit to avoid the conclusive effect of a former decree by averring that it did not plead a particular ground of recovery which it obviously might have pleaded. The parties to the two suits being the same, the judgment in the former case operates as an estoppel both as to those grounds of recovery which were pleaded and as to those which might have been pleaded."

See, to the same effect, Board v. Platt, 79 Fed. 567, 25 C. C. A. 87; Dowell v. Applegate, 152 U. S. 327, 14 Sup. Ct. 611, 38 L. Ed. 463; Fayerweather v. Ritch, 34 C. C. A. 61, 91 Fed. 721. The ground of recovery relied on in the second amended petition not only might have been set up and relied upon in the first, but it actually was set up and relied on. The decree of the circuit court is reversed, and the cause remanded, with instructions to enter a decree dismissing the second amended petition of intervention.

(107 Fed. 349.)

CITY OF AUSTIN v. BARTHOLOMEW et al.

NALLE v. CITY OF AUSTIN.

(Circuit Court of Appeals, Fifth Circuit. March 26, 1901.)

Nos. 882, 894.

1. APPEAL—REVIEW—DECISION ON FORMER APPEAL—LAW OF THE CASE.
   The decision of a question on a former appeal is the law of the case on a subsequent appeal in the same case.

2. MUNICIPAL CORPORATIONS—RECEIVER OF WATER COMPANY—CLAIM FOR HYDRANTS FURNISHED CITY.
   The receiver of a water company is not entitled to claim on its behalf, from a city which it was to supply with water, payment for a specific number of hydrants, and at the same time demand payment for additional hydrants which were to be furnished free on condition that the hydrants first referred to were paid for.

3. SAME—CHARTER POWER—RIGHT TO RENT HYDRANTS OF WATER COMPANY.
   Austin City Charter, art. 6, § 7, authorizes the city "to construct waterworks; * * * to provide the city with water, * * * and to erect hydrants, fire plugs," etc.; and section 20 empowers the city "to provide

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for the prevention and extinguishment of fires," etc. *Held* to authorize it to rent hydrants of a water company for municipal purposes.

4. SAME—WATER COMPANY—ASSIGNMENT OF CONTRACT WITH CITY—VALIDITY—RIGHT TO QUESTION.

Where a city for more than eight years acquiesced to the fullest extent in the assignment by a water company of its rights and privileges under a contract with the city, and allowed the new company during such time to perform the contract of its assignor, it is too late for the city to question the legality of the assignment for the purpose of avoiding performance of the contract on its part.

5. SAME—IMPLIED CONTRACTS.

A city, like an individual or private corporation, may bind itself by implied contracts.

6. SAME—OBLIGATIONS OF NEW COMPANY.

Where a water company has purchased the property, rights, contracts, privileges, and franchises of another company, and, with a city's consent, proceeded to carry out its predecessor's contract to supply the city with water, the obligations of the city and the new company are correlative, and the latter is as much required to furnish water to the city under the contract with the old company as the city is required to pay for it.

In Error to the Circuit Court of the United States for the Western District of Texas.

On April 13, 1882, the city of Austin entered into a contract with the City Water Company, which contract is the basis of this suit. That contract is set out in full in the statement of facts in the case of Bartholomew v. City of Austin, 29 C. C. A. 568, 85 Fed. 359, and it will consequently be referred to here when necessary without incumbering the statement of the case or the opinion with the entire contract. The City Water Company constructed its waterworks and complied with its contract with the city of Austin, so far as the record shows, without complaint, until June 28, 1887, when the Austin Water, Light & Power Company was organized, and purchased and absorbed the City Water Company. After this latter date the Austin Water, Light & Power Company continued to carry out the contract with the city of Austin, as transferee and assignee of the City Water Company, and the city paid and it received the contract price for the hydrants provided in the contract. In the year 1895 the city of Austin completed the erection of waterworks of its own, and from and after the 31st day of December, 1895, refused to pay the water, light, and power company the rentals for hydrants as stipulated in the contract, or any part of the same. On the 10th day of July, 1893, Joseph Spence was appointed receiver of the Austin Water, Light & Power Company by the circuit court of the United States for the Western district of Texas, and said Joseph Spence was afterwards succeeded as such receiver by E. C. Bartholomew, who was in turn succeeded, after a brief period of joint receivership, by Joseph Nalle, the present receiver. The city having refused to pay rent, as stated, for the hydrants, Bartholomew, as receiver, on the 9th day of January, 1897, brought suit against the city of Austin to recover the rent of 100 hydrants at $100 each per annum, 42 hydrants at $50 each per annum, and 25 hydrants at $50 each per annum, for the year 1896. This case came on to be heard before the circuit court, when a demurrer to the plaintiff's declaration was sustained on the ground that the original contract between the City Water Company and the city of Austin created a monopoly, under the constitution of the state of Texas, and was consequently void, and no recovery could be had thereunder. This decision was brought by writ of error to the circuit court of appeals, and this court, in the case of Bartholomew v. City of Austin, above referred to, reversed the judgment of the court below and remanded the case. After the case was thus remanded the plaintiff filed his first amended original petition, in which he claimed the same rentals claimed in the original bill for the year 1896 for 1897 and 1898, and in addition thereto added a count or additional claim for general damages in the sum of $625,000 for breach of contract on the part of the city, in

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preventing him from supplying the inhabitants of the city with water. When the case as thus amended came on to be heard in the circuit court at the adjourned term in May, 1899, it resulted in a verdict and judgment for the plaintiff in the sum of $39,925. The amount of this verdict and judgment was for the rental of 100 hydrants for the years 1896, 1897, and 1898 at $100 each per year, and for the rental of 42 hydrants for the same period at $50 each per year. The court rejected by its rulings during the trial and in its charge the claim for the rental of 25 hydrants, and also for general damages for breach of contract on the part of the city, submitting to the jury the question of the right of the receiver to recover for the 100 hydrants at $100 each per year, and the 42 hydrants at $50 each per year. The charge of the court, which largely raises the questions involved, was as follows: "Now, you gentlemen have been advised during the progress of the trial of the issues involved in this suit. You know it is a suit on a contract, and plaintiff seeks to recover on the contract. That contract is what we would call on the one side, on the part of the plaintiff, 'executory'; that is, to be executed from day to day, from time to time. It has been partially executed, but still, in some of its particulars, is executory on the part of the plaintiff. Now, there are three issues discussed by the gentlemen on either side of this case, and on these three issues I will now suggest to you what the views of the court are: (1) The court is of opinion that the Austin Water, Light & Power Company, who is plaintiff in this suit through its receiver, was the successor generally, by operation of law, of the City Water Company, and also successor to the burdens, mutualities, and reciprocities of the contract between the city of Austin and the City Water Company, which preceded the coming into life of the Austin Water, Light & Power Company, and the successor of the City Water Company for the mutualities of the old company. The contention of the defendant is that, although these propositions be true, yet as matter of law the city has never consented to enter into and be bound by any reciprocities or mutualities of that contract. On that issue I charge you that the city is bound, and you will so find. (2) Passing from that issue to the second one, as to whether or not the plaintiff in this suit has alleged, and is bound by the allegations, that the contract has been breached by both sides, it is necessary for me to charge you on that point. It may be that in the mind of the city, or in the purpose of the city, in some degree, there was an effort to breach the contract. It may be, to some extent if not entirely, that the contract was breached; but that did not destroy the right of the plaintiff in this suit to go on with the contract from its standpoint, and perform its obligations and respond to its duties and recover on the contract. Therefore on that issue I charge you with the plaintiff. (3) Now, the third is the one undisposed of, because my view of the law may not be sufficient to dispose of it, and I will charge you on it. The third is whether or not the plaintiff company complied substantially with its obligations evidenced in the contract. On that issue there is some conflict in the statements of witnesses, and upon that issue you would be allowed to find one way or the other; and on that I charge you, in the line of plaintiff's requested charge, this: 'You are instructed, if you believe from the testimony that plaintiff has maintained during the years 1896. 1897, and 1898 the system of waterworks in his hands as receiver in a condition of efficiency, as to pressure and amount of water, equal to its condition when said plant was accepted by defendant as in compliance with said contract, and was during said period reasonably equipped to furnish, and did during said time tender to the defendant, all the water called for by the contract, in substantial compliance with its terms, then you will find for the plaintiff the hydrant rentals sued for on 100 hydrants at rate of $100 per year per hydrant, payable semiannually, and on 42 hydrants at $50 per annum per hydrant, payable semiannually, for said years, with interest at the rate of 6 per cent. per annum; the amount of said hydrant rentals, with interest at 6 per cent. per annum, calculated to this day, being $———.' On the 25 hydrants claimed for under section 8 of contract, I charge you that you will find nothing one way or the other in your verdict. I have taken up the three issues that I thought proper to present to you as the law, and have directed a verdict for plaintiff on the first two issues, leaving to you the consideration of the third issue; that is, whether or not the company substan-

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tially complied with its obligations in relation to supplying and furnishing and keeping on hand the water it has contracted to furnish to those 142 hydrants. You remember the testimony on that issue, and you will find what your judgment may be on that issue of fact. If you find compliance, substantially, you will find for the plaintiff. If you find no compliance, substantially, you will find to the contrary. Measuring the testimony—weighing the testimony—on that issue, you will keep in mind all the time that a substantial compliance on the part of the plaintiff is sufficient to entitle it to recover. If you find for the plaintiff, you will find this: $100 on 100 hydrants for each of these years, with interest thereon. You will find next for 42 hydrants at $50 for each of these years, with interest thereon. Now, that calculation you can make by keeping this suggestion of the court in mind." Thereupon the city, having at the proper time reserved exceptions, sued out a writ of error; and the receiver, having also excepted in proper time, sued out a cross writ of error.

V. L. Brooks, D. W. Doom, and S. R. Fisher, for city of Austin.

T. M. Gregory, John D. Rouse, and Wm. Grant, for E. C. Bartholomew and Joseph Nalle.

Before SHELBY, Circuit Judge, and NEWMAN and TOULMIN, District Judges.

NEWMAN, District Judge, after stating the facts as above, delivered the opinion of the court.

The first and most important question for consideration in this case is that raised by the contention that the city, by the construction of waterworks of its own in 1895, violated the contract which it entered into with the City Water Company in 1882, to the wrong and damage of its successor, the Austin Water, Light & Power Company. The claim is that it was necessarily implied in the terms and provisions of the contract referred to that the city would not itself erect a system of waterworks, and thereby, to a large extent, destroy the value of the property of the City Water Company. Reliance is placed largely, perhaps mainly, on the case of City of Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341. Much stress is laid also on the recent case of Southwest Missouri Light Co. v. City of Joplin (decided by Judge Philips, in the circuit court of the United States for the Western district of Missouri in March, 1900) 101 Fed. 23. In this latter case the pertinent authorities are cited and reviewed, and in its reasoning and conclusions it is undeniably favorable to the contentions of the receiver in this case. In the case of City of Walla Walla v. Walla Walla Water Co., supra, there was an express stipulation that the city would not erect waterworks of its own, although it is true that the reasoning of the court and the conclusions reached are not based entirely on this stipulation. We think, however, that the recent case of Bienville Water-Supply Co. v. City of Mobile, 175 U. S. 109, 20 Sup. Ct. 40, 44 L. Ed. 92, being later than the Walla Walla Case, and more like this case in its facts, is more pertinent here. In this latter case the court affirmed the judgment of the circuit court in dismissing a bill which set up on behalf of the Bienville Water-Supply Company against the city of Mobile substantially the same facts which are relied upon by the plaintiff here. The effect of this decision by the supreme court in the case of Bienville Water-Supply Co. v. City of Mobile is emphasized

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as authority in this case in favor of the right of the city of Austin to erect waterworks of its own by the opinion filed in the circuit court by Judge Toulmin (95 Fed. 539), which opinion was in review in the supreme court, and apparently fully approved. The syllabus of the opinion in the circuit court is as follows:

"A contract between a city and a water company, chartered and given the right to lay its mains in the streets of the city by an act of the legislature which merely bound the company to maintain a certain number of fire hydrants, for which the city agreed to pay a specified rental for a term of years, and fixed a maximum price, beyond which the company agreed it would not charge for water furnished for domestic use during the term, but which contained no grant of any privilege to the company, and no contract for furnishing water to the inhabitants of the city, nor agreement that the city should not do so, is not violated by the erection or purchase of waterworks by the city for the supplying of water to its inhabitants and for its own use, and affords no ground for an injunction to restrain the city from so doing in pursuance of authority contained in its charter; the city not having refused to pay the stipulated rentals."

But it is not necessary to further elaborate this question, as it is res judicata in this court. In the former opinion in this case (85 Fed. 359), by Judge Pardee, it is said:

"The contract on which this action is based is a grant and privilege for a period of 20 years to the City Water Company to supply water to the city of Austin, and the inhabitants thereof, with the right of extension under certain named conditions. The grant is not in terms an exclusive one, and, so far as the language used is concerned, there is nothing to hinder the city of Austin from erecting other and competing works, nor from granting to others the right to use the streets, nor from contracting with others for the furnishing of more water, as the needs of the city may require. It is very well settled that in contracts with states or municipalities conferring powers, grants, or privileges on private corporations affecting the general rights and interests of the public, the grant or privilege must be clearly conferred; all implications, doubts, and ambiguities being resolved against the grant or privilege claimed,"—citing Richmond, F. & P. R. Co. v. Louisa R. Co., 13 How. 71, 81, 14 L. Ed. 55; Rice v. Railroad Co., 1 Black, 358, 380, 17 L. Ed. 147; Bank v. Skelly, 1 Black, 436, 446, 17 L. Ed. 173; Stein v. Water-Supply Co., 141 U. S. 67, 80, 11 Sup. Ct. 892, 35 L. Ed. 622.

To the same effect is the decision of the supreme court of Texas in City of Austin v. Nalle, 85 Tex. 520, 22 S. W. 668, 960.

We shall adhere to the former ruling of the court on this question, which disposes of the claim of the receiver for general damages against the city for breach of contract.

It is next contended on the part of the receiver that the court erred in refusing to allow him to recover for the 25 hydrants at $50 each. The second clause of the eighth section of the original contract between the city of Austin and the City Water Company and its assigns is relied upon as the basis for this claim of rental on the part of the receiver. It is as follows:

"The said city of Austin shall have the right to erect and connect twenty-five fire hydrants, with the main, at any time, under the provisions of this contract, at the expense of said water company, and use the same for the prevention and extinguishment of fires, free of charge: provided, always, that the city of Austin shall first pay a rental on the first one hundred (100) hydrants contemplated in this contract."

It is urged on behalf of the receiver that this provision was inserted in the contract for the purpose of inducing and insuring prompt pay-

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ment of the rent for the 100 hydrants, as this was necessary to enable the water company to erect and maintain the 25 hydrants for which the city was to pay nothing. Hence it is insisted that payment of the rent of the 100 hydrants was a condition precedent to the right of the city to enjoy the free use of the other 25 hydrants. We are of opinion that the receiver cannot claim on behalf of the water company payment for the 100 hydrants, and at the same time demand payment for the 25 hydrants which were to be furnished free on condition that the 100 hydrants were paid for. The receiver could very well demand payment for the 25 hydrants if he was not at the same time insisting on the contract price of the 100 hydrants. We cannot compel compliance with the terms of the contract, and at the same time require that to be done which was stipulated for in the event the contract was not complied with. We think the ruling of the court below on the demurrer to this item, and in disallowing the same in the charge to the jury, was correct.

We come next to the consideration of the exceptions of the city to the right of the plaintiff to recover the rental for 142 hydrants. The verdict in favor of the city was for 100 hydrants at $100 per annum each, and 42 hydrants at $50 per annum each, for the years 1896, 1897, and 1898, with interest at 6 per cent., aggregating $39,925. The 100 hydrants were expressly provided for in the contract, by section 6. The 42 hydrants were erected and put in under a provision of section 7 of the contract. These latter hydrants were to be erected as mains were extended, and were to be paid for at the price indicated.

It is first claimed on behalf of the city that it had no power to enter into the contract originally with the City Water Company. The charter of the city of Austin (article 6, § 7) gives the city authority "to construct water works, gas works, and street railroads within or beyond the city limits, or both; to provide the city with water and gas, and to erect hydrants, fire-plugs and pumps in the streets, to erect the necessary machinery, lamp posts, &c. for lighting the city within and beyond the limits of the city, for the convenience of the inhabitants of the city and the environments"; and the twentieth section of the same article empowers the city "to provide for the prevention and extinguishment of fires," etc. For present purposes it is only necessary to ascertain if the city had authority under these charter provisions to rent hydrants. After giving the city authority to construct waterworks, etc., within or beyond the city limits, or both, comes a semicolon; then the section proceeds: "to provide the city with water and gas, and to erect hydrants, fire-plugs, &c. in the streets"; and then, as if to emphasize that authority more strongly, in the twentieth section it is authorized "to provide for the prevention and extinguishment of fires." Independently of the general provision of the Revised Statutes of the State of Texas (article 706), we think there can be no question that the charter itself gave the city ample authority to enter into this contract and to carry out the same, so far, certainly, as is material in the present case.

It is next contended for the city that the contract between the city and the City Water Company was not assignable, and that the Austin

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Water, Light & Power Company consequently was not authorized to execute the same, or to require performance on the part of the city of the terms of the contract. Whatever may have been the merits of this contention, if made at the time of the transfer and sale by the City Water Company to the Austin Water, Light & Power Company, we think it is too late now for the city to raise this question. The sale and transfer was made in June, 1887, and from that time until the 31st of December, 1895, the city accepted performance of this contract from the new company and paid for the water without question. Thus for more than eight years the city acquiesced to the fullest extent in this assignment, and, having allowed the new company during all these years to perform the contract, it cannot now repudiate the new arrangement and claim that it is illegal. If there was any question about the power of the city to make the contract originally for the rent of the hydrants, there might be some question as to its power to impliedly agree to accept a new party to carry out with it the rental contract. But, assuming such authority to make the contract originally, the city, like an individual or a private corporation, may bind itself by implied contracts. Dill. Mun. Corp. (4th Ed.) §§ 451–459.

It is agreed as part of the facts in this case that:

"On the 22d of June, 1887, the Austin Water, Light & Power Company, also a domestic corporation of the state of Texas, was incorporated under the general laws of the state of Texas, to exist for a term of fifty years. The purpose of its incorporation was to supply water, electric light, and power to the inhabitants of the city of Austin and its vicinity, for public and private use." And further: "After the incorporation of the Austin Water, Light & Power Company, and after the establishment by the City Water Company of its said waterworks plant, the said City Water Company, on or about the 28th day of June, 1887, executed certain instruments purporting to sell, convey, transfer, set over, and deliver to the Austin Water, Light & Power Company its waterworks plant, and, all and singular, its property, rights, contracts, privileges, and franchises. That at all times since said date the Austin Water, Light & Power Company, its officers and agents, have exercised dominion and control over the waterworks plant of the City Water Company, and over, all and singular, the property, rights, contracts, privileges, and franchises of the City Water Company; and since said time the City Water Company has had no waterworks plant, equipment, or appliances wherewith to furnish water to the city of Austin or its inhabitants, other than the ones it undertook to convey as above set out."

It appears, therefore, that the City Water Company transferred to the Austin Water, Light & Power Company its contract with the city of Austin for the rental of hydrants, and that the city acquiesced in this transfer without question, so far as the record shows, and that during all this period, as found by the verdict of the jury, the Austin Water, Light & Power Company complied substantially with its contract with the city to furnish the hydrants with water. It makes a clear case of consent on the part of the city to the transfer of the contract, and a consent which we think is binding. It is urged, however, that this contract is not one which could be enforced against the city, unless it could be also enforced against the water, light and power company, and that the company is not bound by, and could not be held to a compliance with, the contract. We do not think this is true. The new company purchased from the old company its property,

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rights, contracts, privileges, and franchises, and went forward at once to carry out the contract with the city. We see no reason whatever for the claim that the obligations of this transferee company and the city were not correlative. If, as we believe, under the facts in the case, the city can be required to pay for the water, we think the Austin Water, Light & Power Company could be required to furnish it. The case of Fergus Falls Water Co. v. City of Fergus Falls (C. C.) 65 Fed. 587, was a suit for the rent of hydrants, and is interesting in connection with the question raised here. One sentence in that decision is exceedingly appropriate, as follows: "The law does not favor the idea that a man shall abide by a contract when it is advantageous to him, and repudiate it when it becomes irksome."

The contract between the city and the City Water Company gave the city the right at the expiration of 10 years thereafter to purchase the waterworks, and, after providing the method for bringing about such purchase, stipulated that, in case the city did not purchase the waterworks, "then all the rights and privileges of this contract granted to said City Water Company shall be extended to said company, its successors or assigns, for a further term of twenty years thereafter." It is urged on the one hand that this expression, "its successors or assigns," was used in the sense which indicated that there might be successors and assigns of the City Water Company at the time the city took advantage of this option, which would imply the understanding and agreement that the contract was assignable at any time. On the other hand, it is urged that this only contemplated that the new contract might be made with a successor or assigns, or that such new contract might be itself afterwards assignable. We think the right of the Austin Water, Light & Power Company to collect the hydrant rentals exists, for the reasons given above, without deciding this latter question, which we shall not undertake to discuss

Other errors are assigned, which need not be considered, for the reason that the case is controlled and must be determined on the undisputed facts and the law applicable thereto, as has been indicated. The judgment of the circuit court was right, and should be affirmed.

(107 Fed. 356.)

MEXICAN CENT. RY. CO., Limited, v. GLOVER.

(Circuit Court of Appeals, Fifth Circuit. March 5, 1901.)

No. 958.

1. PEREMPTORY INSTRUCTION FOR DEFENDANT—REFUSAL.

Refusal of a peremptory instruction for defendant at the close of plaintiff's evidence was proper, if at the time of the request therefor defendant had not rested, but afterwards introduced evidence in its own behalf.

2. RAILROAD COLLISION—INJURY TO FIREMAN—NEGLIGENCE OF COMPANY.

Plaintiff, a fireman on a north-bound train, was injured in jumping from his engine to avoid being involved in a collision with a south-bound train standing on the main track at a blind siding, where the trains had been ordered to meet. The night was dark, and the engine in front of

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him was without headlight or signal lamps, and the wind was blowing sand and snow across the track. The siding was without a telegraph station or a signal house by which it could be recognized, and it was a fair inference from the evidence that there was no signal light at the meeting point. *Held*, that the negligence causing the collision was attributable to the company, in ordering the trains to meet at such place, though it concurred with negligence on the part of plaintiff's fellow servants, the conductor and engineer of the south-bound train, in operating it without lights.

3. INJURIES TO EMPLOYES—EMPLOYER'S LIABILITY FOR NEGLIGENCE—LAWS OF MEXICO—PRESUMPTION.

In the absence of proof, it is to be presumed that in the matter of the liability of an employer for his negligence resulting in injuries to an employé, the law of Mexico is the same as the law of Texas, in both of which the civil law originally prevailed.

4. SAME—LIABILITY OF RAILROAD COMPANIES.

The Mexican railroad law, declaring (article 184) that "railway companies are liable for all faults or accidents which occur through the tardiness, negligence, imprudence, or want of capacity of their employés," makes a company liable for an injury to an employé resulting either solely from its own negligence, or from its own negligence concurring with that of fellow servants.

5. INSTRUCTIONS TO JURIES—PRACTICE IN FEDERAL COURTS.

The laws of Texas as to instructing the jury in writing do not obtain in the federal courts.

6. INJURY TO FIREMAN—ACTION FOR INJURIES TO FIREMAN—PEREMPTORY INSTRUCTION FOR PLAINTIFF.

Where the uncontradicted facts establish the negligence of the company and its agents in causing an injury to a fireman, and his right to recover damages therefor, no error can be predicated on a peremptory instruction in his favor.

7. CIRCUIT COURT—EXAGGERATION OF DAMAGES TO CONFER JURISDICTION—QUESTION FOR COURT.

Whether plaintiff's demand for damages was colorable and exaggerated, to confer jurisdiction on the circuit court, presents a question for the court to decide, which, if proper to submit to the jury, should be submitted as to the facts, and separate from the merits.[1]

8. ACTION FOR INJURIES TO FIREMAN—PLEADING AND PROOF.

A petition for injuries to a fireman alleged that "he was greatly, seriously, and permanently injured on his head, eye, right shoulder, hand, side, leg, hips, back, and spine, and was seriously and permanently injured for life," and that "as a result of his injuries he has become weak, inefficient, and incapacitated in his business of railroading, in which he is skilled." *Held* to warrant evidence of vomiting and hemorrhages which followed soon after the injuries complained of.

In Error to the Circuit Court of the United States for the Western District of Texas.

J. M. Glover, defendant in error, brought this suit in the court below against the Mexican Central Railway Company, Limited, plaintiff in error, to recover damages against said railway company for personal injuries alleged to have been received by said Glover in the republic of Mexico, while an employé of said company, in jumping from the engine of which he was fireman, when it was about to collide with a train standing on the main track of said company's line. Glover claimed in his petition that the company was negligent in employing an untried engineer, unacquainted with the road, and in failing to furnish sufficient oil for headlights of the train which he met on the main track; that on account of said negligence the locomotive had no headlight, and said train could not be seen until Glover's train had approached the same

[1] Jurisdiction of circuit courts as determined by amount in controversy, see notes to Auer v. Lombard, 19 C. C. A. 75; Shoe Co. v. Roper, 36 C. C. A. 459.

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so close that a collision and wreck could not be averted, and that plaintiff jumped from his engine in order to avoid serious bodily injuries; that the crew of Glover's train had orders to meet the train with which it collided at a station called "Agua Nueva"; that the engineer of the train with which Glover's train collided negligently, carelessly, and willfully ran by said station of Agua Nueva during the night without looking to see or using any diligence, and was met by Glover's train several miles beyond said station; that in jumping from his engine plaintiff struck his head, shoulder, arm, back, right side, and hips, thereby greatly, seriously, and permanently injuring his head, eyes, right shoulder, hand, side, leg, hips, back, and spine, for which he claimed damages in the sum of $15,000. Upon the trial, judgment was rendered for Glover in the sum of $1,085, from which this writ of error is sued out.

A bill of exceptions purporting to contain all the evidence offered shows Mexican law proved as follows:

"Art. 308. Federal Penal Code of Mexico. No person can be charged with civil liability upon an act or omission contrary to a penal law, unless it be proven that the party sought to be charged, usurped the property of another, or that without right he caused himself, or any means of another, damages or injuries to the plaintiff, or that the party sought to be charged, being able to avoid the damages they were caused by a person under his authority.

"Art. 309. Whenever any of the conditions of the present article are established, the defendant shall be civilly liable without regard to whether he be absolved or condemned to criminal liability."

"Art. 312. In order that the master may be held civilly liable through their clerks and servants according to the provisions of articles 308 and 309, it is an indispensable condition that the act or omission of the clerks or servants causing the liability shall occur in the service for which they were employed.

"Art. 313. Under the conditions of the preceding article, those liable are * * * railway companies."

Also the following articles from the act of congress of Mexico of December 16, 1881:

"Article 1. The executive shall regulate the service of railroads, telegraphs and telephones constructed, or which in the future may be constructed upon Mexican territory, according to the following cases: (1) Railroads, telegraphs and telephones which in the federal district and territory of Lower California, unite together two or more municipalities, or the federal district and territory of Lower California with one or more states; those which communicate with two or more states with each other; those which touch at any point in the territorial boundary line of the republic and foreign countries or run parallel therewith within a region of twenty leagues, are known as general lines of communication within the meaning of fraction XXII of art. 72 of the constitution. (2) These general lines of communication and their branches shall be subject exclusively to the federal legislative, executive and judicial powers, in their respective spheres, in all cases where any of the following matters are involved: * * * (g) Construction and repair of the works. Crimes committed against the security or integrity of the works or against the operation of the lines. (h) Security of the same works for which the companies are obligated, and crimes or misdemeanors of the companies through delays or obstruction, carelessness or fault in the service and for accidents or mishaps in the operation."

From the regulations for the construction, maintenance and operation of railroads:

"Art. 52. The coaches and cars which enter into the make-up of a train shall have the drawheads of the same height, so that their centers will be opposite to each other.

"Art. 53. The conductor of a train en route is the person in command of all the train crew, including the engineer and fireman."

"Art. 121. Engineers shall communicate by means of a steam whistle with the agents charged with the duty of watching, and with the conductors of trains, using the following signal: * * * Three blasts or sounds of

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the whistle shall be the signal that the entire train is going to move backward."

"Art. 124. Companies [railroad] are liable for accidents which occur through the failure to observe the provisions of this chapter [chapter 7], respecting signals, and for employing people who do not have certificates showing that their sight and hearing are free from infirmity which does not permit them to recognize the signals."

"Art. 184. Companies [railway] are liable for all faults or accidents which occur through tardiness, negligence, imprudence or want of capacity of their employés."

"Art. 208. All violations of this law, which companies [railway] commit, shall be subject to punishment by the administration by fine up to five hundred dollars, which the department of public works shall assess, reserving always the right of individuals, through indemnity, and the liability which the companies may have incurred through criminal acts or omissions committed by them."

The bill of exceptions concludes as follows:

"Here plaintiff rested, whereupon defendant filed its written motion requesting the court to instruct for defendant for the reason that the testimony showed that the wreck and plaintiff's injuries resulted through the negligence of the engineer in charge of engine No. 229, in running beyond his meeting point, and in failing to have his headlight burning; that said engineer was the fellow servant of plaintiff, for whose negligence defendant was not liable. Whereupon the court held that the evidence showed that plaintiff's injuries resulted through the negligence of the engineer in charge of engine No. 229, who was a fellow servant with plaintiff, but held that he would presume that the civil law existed in the republic of Mexico, and that under the civil law the doctrine of fellow servant is not recognized, and that therefore defendant railway company was liable for the negligence of plaintiff's fellow servant, the engineer in charge of engine No. 229, and wherefore said motion to instruct was overruled; said motion being as follows, to wit: 'Now, in the above styled and numbered cause comes the defendant, after plaintiff had closed his testimony and rested, before any testimony was introduced by defendant, and moves the court to instruct the jury as follows: "Gentlemen of the Jury: Plaintiff having failed to prove by competent evidence under the pleadings sufficient facts to warrant his recovery herein, you are charged to find a verdict for defendant."' Upon the overruling of said motion defendant then and there, in open court, duly excepted, and now herewith tenders this, its first bill of exception, asking that the same be allowed by the court and made a part of the record herein, which is accordingly done. Aleck Boarman, Judge.

"Whereupon, after said motion was overruled, defendant asked leave to offer testimony as to the extent and character of plaintiff's injuries, and upon only said issue, which privilege was granted by the court, and the following testimony was offered by defendant: * * * Under all of the foregoing proof, defendant again asked the court to give the following charge: 'Defendant asks the court to charge the jury to find a verdict in this case for defendant.' Which charge was by the court refused, and defendant then and there in open court excepted, and herewith tenders this its second bill of exception, asking that the same be allowed by the court and made a part of the record herein, which is accordingly done, this ——— day of ———, A. D. 1900. Aleck Boarman, Judge.

"Be it further remembered, that upon the foregoing proof the court gave to the jury no charge in writing, but verbally instructed the jury. To the action of the court in instructing the jury verbally, without giving them a written charge, defendant then and there in open court excepted, and now herewith tenders this its third bill of exception, asking that same be allowed by the court and made a part of the record herein, which is accordingly done, this ——— day of ———, A. D. 1900. Aleck Boarman, Judge.

"Be it remembered, further, that the court, proceeding to instruct the jury verbally, charged the jury to find for the plaintiff as against defendant under the foregoing proof, leaving only the question of the extent of plaintiff's dam-

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ages as an issue to be determined by the jury; the court assuming, as a matter of law, that defendant was guilty of negligence resulting in plaintiff's injury, defendant being bound by the negligence of its employés. To the action of the court in instructing the jury to find for plaintiff as against defendant under said proof, defendant then and there in open court excepted, and now herewith tenders this its fourth bill of exceptions, asking that the same be allowed by the court and made a part of the record herein, which is accordingly done, this ——— day of ———, 1900. Aleck Boarman, Judge.

"Be it further remembered, that the court, proceeding to instruct the jury verbally upon the measure of damages, was requested by defendant to submit to the jury the issues raised by defendant's plea, to the effect that if plaintiff fraudulently sought to give the court jurisdiction over this controversy, that if plaintiff had suffered no serious or permanent injuries, and that if plaintiff was injured at the time he alleges in his petition, but that if his injuries were of a temporary and slight nature, and that if plaintiff sought to give this court the jurisdiction by fraudulently claiming that his injuries were serious or of a permanent nature, when he knew that the injuries sustained by him were insignificant, and that his damage would be much less than the jurisdictional amount of this court, they should find for defendant, which instruction was refused by the court, the court failing and refusing to instruct the jury as to the issue raised by plaintiff's plea in toto, to which action of the court defendant then and there in open court excepted, and herewith tenders this its fifth bill of exceptions, asking that the same be allowed by the court and made a part of the record herein, which is accordingly done, this 21st day of May, A. D. 1900. Aleck Boarman. Judge."

Another bill of exceptions shows:

"That upon the trial of the above styled and numbered cause, while testifying upon the stand in his own behalf, in answer to questions asked by his attorneys, plaintiff testified: 'I did vomit later on, when I tried to go to work. Threw up blood. It was from my stomach, I guess. It came out of my mouth, and not out of my nose. It had never occurred before. It occurred the second night after I went to work, and about three weeks after I was injured. Mr. Cole was with me when I had the hemorrhage.' To which testimony the defendant then and there in open court objected, and asked that the court exclude the same, for the reason that there were no allegations in plaintiff's petition sufficient to warrant the introduction of evidence as to such character of injuries; the allegations of said petition as to the character of injuries sustained by plaintiff being as follows: 'That he was greatly, seriously, and permanently injured on his head, eye, right shoulder, hand, side, leg, hips, back, and spine, and was seriously and permanently injured for life.' 'That, as a result of his injuries, he has become weak, inefficient, and incapacitated in his business of railroading, in which he is skilled.' Which objection the court overruled, and defendant then and there in open court excepted."

T. A. Falvey and Waters Davis, for plaintiff in error.
G. E. Wallace, for defendant in error.

Before PARDEE and SHELBY, Circuit Judges.

PARDEE, Circuit Judge, after stating the facts in the foregoing language, delivered the opinion of the court.

The first assignment of error, complaining of the refusal of the court below to instruct the jury at the close of the plaintiff's evidence to find for the defendant, is not well taken, because at the time of requesting such instruction the defendant had not rested its case, but afterwards went on and introduced evidence in its own behalf. Railway Co. v. Cummings, 106 U. S. 700, 1 Sup. Ct. 493, 27 L. Ed. 266; Insurance Co. v. Crandal, 120 U. S. 527, 530, 7 Sup. Ct. 685, 30 L. Ed. 740.

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The second assignment of error alleges that the court erred in refusing to instruct the jury to find for the defendant after all the testimony was offered, on the ground, first, that plaintiff's injuries resulted through no negligence of defendant in any respect whatsoever, but plaintiff's injuries resulted through the negligence of Ragland, the engineer of the south-bound train hauled by engine No. 229 in running beyond Agua Nueva, the meeting point, and in failing to have a headlight burning upon his engine. Under the evidence as recited in the transcript the collision between the north and south bound trains of the defendant company on the main track was due to the negligence of the company and of its agents in charge and control of the south-bound train, and we do not think that under the evidence the sum total of the negligence can be apportioned to Ragland, the engineer in charge of the south-bound train. It is admitted the night was dark, the engine was without headlight or signal lamps, the wind was blowing sand and snow across the track, while the place at which the trains were to meet was only a blind siding,—a place without a telegraph station or a signal house by which it might be recognized. Whether there was any signal light at the meeting point does not appear by the evidence, and it is a fair inference that there was none. Under this state of facts, the negligence causing the collision may well be attributed to the company in ordering the trains to meet at such blind siding. It may also fairly be inferred that with such negligence of the company there was concurring negligence on the part of the conductor and engineer operating the south-bound train without a headlight or any signal lights.

The second reason assigned to show error in the ruling of the court is:

"That the court could not presume the existence of the Civil Code in Mexico; that it could not presume that the principle of assumed risk of negligence of fellow servants was not in vogue in Mexico, and for the reason that plaintiff did not plead or attempt to prove that the civil law was in effect in Mexico, concerning the matter of liability and rights of railroad companies, but pleaded and set up various statutes of Mexico concerning the rights of action against railroads, and liabilities of railways and corporations for damages in suits of this kind, claiming that defendant was liable by reason of the statutory law of Mexico, not the civil law; that none of the laws set up and pleaded by plaintiff showed that the defendant was liable for negligence of plaintiff's fellow servant Ragland."

In Railway Co. v. Marshall, 34 C. C. A. 138, 91 Fed. 938, in which the law of Mexico with regard to employers' liability was in question, this court held:

"In the absence of proof, it is to be presumed that in the matter of liability of an employer for his negligence, resulting in injuries to an employé, the law of Mexico is the same as the law of Texas, in both of which the civil law originally prevailed. See Phil. Ev. (Cowen & Hill's and Edwards' notes) p. 429 et seq., and adjudged cases there cited; 1 Rice, Ev. p. 65; Whart. Ev. § 1292. Indeed, there is good authority for holding that, as the state of Texas recently constituted a part of the republic of Mexico, the courts in the state of Texas, in proper cases, will take judicial notice of the laws common to both prior to the separation. Malpica v. McKown, 1 La. 248; Berluchaux v. Berluchaux, 7 La. 539. Further than this, it is to be noticed that under the

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laws of Mexico, as proved herein, it is clear that a civil action may be brought to recover damages resulting from negligence."

And we think the same rule should be applied in this case, so far as the law of Mexico was not proved on the trial. The record shows, however, that the defendant pleaded and proved the following as being laws in force in Mexico, to wit:

"Art. 53. The conductor of a train en route is the person in command of all the train crew, including the engineer and fireman."

"Art. 184. Railway companies are liable for all faults or accidents which occur through the tardiness, negligence, imprudence or want of capacity of their employés."

And the plaintiff proved rules of the Mexican Central Railway Company as follows:

"Rule No. 34. Each train running after sunset, or when obscured by fog or other cause, must display the headlight in front, and two or more red lights in the rear."

"Rule No. 84. All north-bound trains have the absolute right of track over all south-bound trains."

It follows that the court did not err in refusing to instruct the jury to find a verdict for the defendant, because, whether the accident resulted solely from the negligence of the company, or resulted from the negligence of the company concurring with that of a fellow servant of the plaintiff, under the laws of Mexico the defendant company is liable for the damages resulting.

The third assignment of error complains of the action of the court in instructing the jury verbally instead of in writing, for the reason that under the laws of the state of Texas the courts are required to give their instructions in writing, and for the further reason that the defendant could not reserve its exceptions to the charge of the court without interrupting the court at the time it was delivering its charge, and the jury could not so well understand the law under verbal instructions as they might have done under written instructions. Assuming that this assignment of error is serious, we dismiss it with the remark that the laws of Texas with regard to instructing juries in the state courts do not prevail in the courts of the United States.

The fourth assignment of error complains that the court instructed the jury to find against the defendant and in favor of the plaintiff for such damages as the plaintiff sustained. The reason assigned is that it was the province of the jury to pass upon the question as to whether or not, under the proof, any one was guilty of negligence entitling plaintiff to recover; and, further, that it was the province of the jury to pass upon the credibility of the witnesses and the weight of the evidence. The uncontradicted facts in the case established the negligence of the company and its agents, and also, in our opinion, the right of the plaintiff to recover damages for such injuries as he suffered.

The fifth assignment of error complains that the court erred in refusing to charge the jury upon the issues presented by the defendant's plea to the jurisdiction, for the reason that it appeared from the testimony in the case that the plaintiff was not seriously or permanently injured, and that he sought to exaggerate his claim

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for damages in order to bring his case within the jurisdiction of the court. The question whether the demand of the plaintiff for damages was colorable and exaggerated for the purpose of conferring jurisdiction on the circuit court was one for the court to decide. Section 5, Act March 3, 1875 (18 Stat. 472; 25 Stat. 433, § 6). If proper to submit it at all to a jury (on which we express no opinion), the submission should be as to facts, and separate from the merits. The submission of the question as asked by plaintiff in error, if granted, and the finding had been favorable, would have resulted in res adjudicata as to defendant in error's right to recover for such damages as he actually suffered. The case was submitted solely as to the damages suffered by the plaintiff below, and the verdict was for $1,085. The record shows no renewal of the application to dismiss the case for fraud on the jurisdiction of the court.

The sixth and seventh assignments of error complain of the admission of evidence over the objections of the defendant below tending to show that the plaintiff suffered from hemorrhages and vomiting within a short time—two or three weeks—after the injuries complained of. The evidence was objected to because there are no allegations in the plaintiff's petition sufficient to warrant the introduction of evidence as to such injuries. The allegations of the petition as to the character of injuries are that "he was greatly, seriously, and permanently injured on his head, eye, right shoulder, hand, side, leg, hips, back, and spine, and was seriously and permanently injured for life," and that "as a result of his injuries he has become weak, inefficient, and incapacitated in his business of railroading, in which he is skilled." Evidence of vomiting and hemorrhages which followed soon after the injury directly tended to establish the character of Glover's injuries, and we are clear that the allegations of the petition are sufficiently broad to fully permit such evidence. See 5 Enc. Pl. & Prac. p. 746; Railway Co. v. McMannewitz, 70 Tex. 73, 8 S. W. 66; Railway Co. v. Harris, 122 U. S. 608, 7 Sup. Ct. 1286, 30 L. Ed. 1146.

This disposes of all the assignments of error, and with such result that the judgment of the circuit court must be affirmed; and it is so ordered.

(107 Fed. 363.)

CASS COUNTY v. GIBSON.

(Circuit Court of Appeals, Sixth Circuit. March 5, 1901.)

No. 917.

1. ASSIGNMENTS OF ERROR—RULINGS ON EVIDENCE—COMPLIANCE WITH COURT RULES.

   To compel consideration of an assignment of error as to the admission or rejection of testimony, it should quote the full substance of the evidence admitted or rejected, as required by the rules of court relating to such assignments.

2. APPEAL AND ERROR—RESERVATION OF EXCEPTIONS.

   A general exception to a court's refusal to give requested instructions presents no question for review.

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3. SAME—REFUSAL OF INSTRUCTIONS—COMPLIANCE WITH COURT RULES.
To compel consideration of an assignment of error as to the refusal of instructions, it should set them out totidem verbis, as the rules of court require.

4. BUILDER'S CONTRACT—TENDER OF PERFORMANCE—INSTRUCTIONS—OBJECTIONS—QUESTION FOR JURY.
An instruction that, inasmuch as a builder was prevented from going on with his contract, he was entitled to recover for what he had done, if his tender of performance by the correction of defects was made in good faith, was not incorrect because the tender may have been made on condition that sums claimed to be due should first be paid, and no reference was made thereto, as the condition was a circumstance to be considered by the jury with others in determining whether the tender was made in good faith.

5. INSTRUCTIONS—OBJECTION FOR INSUFFICIENCY—NECESSITY.
An objection to an instruction that it was not sufficiently full cannot be sustained on appeal if the attention of the court below was not called thereto by a request for further instruction.

6. SAME—GENERAL EXCEPTIONS—INADEQUACY.
A general exception to an instruction, which does not suggest or point out the defect complained of, so as to bring it distinctly to the court's attention, and afford an opportunity to remedy an omission complained of, if any exists, presents no question for review.

7. ERECTION OF COURT HOUSE—POWERS OF COUNTY BOARD—DELEGATION TO BUILDING COMMITTEE.
The power vested by 1 How. Ann. St. § 483, in a Michigan county board of supervisors to erect a court house voted for by the county electors at a cost not to exceed a specified amount, involves no judgment and discretion on the part of the board in the performance of business acts relating to details of construction under the contract and the supervision of the work, and hence they may delegate supervisory power to a building committee, with authority to direct extra work and make changes in the building contemplated in the general contract.

In Error to the Circuit Court of the United States for the Western District of Michigan.

This action was brought by defendant in error against plaintiff in error to recover for the reasonable value of labor done and materials furnished in the construction of a court house for plaintiff in error, and damages for being prevented from the execution of a contract, which the plaintiff in error undertook to rescind, and the further execution of which by the defendant in error was in fact suspended by the plaintiff in error. Pursuant to legislative authority in that respect, the board of supervisors of Cass county, Mich., adopted a resolution "for the erection and completion of said court house, including the furnishings, plumbing, and heating apparatus, as hereinbefore specified, within the sum of ($40,000) forty thousand dollars." This proposition, having been submitted to the electors of that county, was carried, and the construction of a court house duly authorized by popular vote. The constitution of Michigan (article 10, § 6) provides that "a board of supervisors, consisting of one from each organized township, shall be established in each county, with such powers as shall be prescribed by law." By section 9 of the same article this board is authorized to borrow $1,000 for the purpose of constructing or repairing public buildings, etc., with the further provision that "no greater sum shall be borrowed or raised by tax for such purpose in any one year, unless authorized by a majority of the electors of such county voting thereon." Among the powers defined and prescribed by statute is the power (1 How. Ann. St. § 483) "to cause to be erected the necessary buildings for poorhouses, jails, clerk's offices and other county buildings, and to prescribe the time and manner of erecting the same"; and in connection with the power is the limitation or restriction that "none of the powers mentioned in the sixth subdivision of the last preceding section shall be exercised without a vote of two-thirds of all the members elected to such board" (Id. § 484).

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In the execution of the power thus vested in the board of supervisors, a contract for the erection of a court house was entered into and duly executed on behalf of the county with the defendant in error. The contract price for the construction of the court house was $31,500. A separate contract was made with plaintiff in error for furnishing the court house with a heating and ventilating plant for the sum of $3,200. The contract, among other terms, provided for any changes, modifications, or additions which might be desired by the board of supervisors. The contract itself provides for supervision of the work by an architect and the board of supervisors. The board of supervisors appointed a building committee of five persons, four being members of the board of supervisors, and one a citizen of the county; the contract itself naming the committee, and reciting that such committee is to be called the "board," with the further provision that "the board of supervisors, and the said building committee, and the local superintendent can only visit the building officially." The contract clearly contemplates that its execution in detail, with any changes or additions, is to be under the immediate direction of this building committee. In the progress of the work, and at an early stage, differences and controversies arose between the parties, the particulars of which it is not necessary now to recite. The right to rescind the contract on behalf of the county on certain named grounds was expressly provided for in the agreement itself, and, when disputes arose, notice was given to the contractor, in effect, to appear at a time appointed, when the board of supervisors would consider whether or not it would terminate the contract, setting out in detail the grounds for the rescission. The contractor, in answer to the notice, sent to the board of supervisors a written communication, in which it was declared, in effect, that he stood ready to comply with the contract on his part, and to make good any omission or to remedy any defect, provided the board of supervisors would proceed with the execution of the contract on behalf of the county. The board of supervisors subsequently adopted a resolution rescinding the contract, and stating in detail the grounds on which this action was based. The building committee then, on behalf of the county, took possession of the premises, and also took and appropriated all of the material and appliances on hand, including, of course, such parts of the structure as had been erected up to that time. The contract for the heating and ventilating plant was also rescinded. Thereupon payment was demanded, on behalf of the defendant in error, for the work done and the materials furnished and on the ground; and, payment having been refused, this suit was instituted. The account, payment of which was demanded and recovery upon which was sought, was in part for extra work done and additions made under direction of the building committee, and by agreement with that committee as to the price of such extra work; and recovery on that account was resisted upon the ground that the board of supervisors could not lawfully delegate power to a committee to make changes and variations in the written contract, and thereby create a valid debt against the county; the contention being that the board of supervisors alone could exercise such power, and that it could not be delegated to a committee or other agent.

The learned circuit judge stated the case presented by the pleadings in his charge to the jury, as follows: "The plaintiff in this case claims to recover: First. For the reasonable value of the labor and materials which he contributed to the erection of the court house for the defendant. Included in that claim is the material which had not yet been put into the building as part of the structure, but which was lying around on the grounds, and which was afterwards appropriated by the defendant. That is the first claim of the plaintiff in the case. To that claim the defendant filed a general denial of its liability to damages on account of the matters alleged in that count or claim in the declaration, and it also sets up what in legal parlance is termed a claim in recoupment, which, being interpreted, is this: that is a counterclaim in which the defendant assumes the position of plaintiff, and the plaintiff becomes defendant; it is in the nature and analogy of a set-off, where the plaintiff asserts a liability on the part of the defendant, and the defendant in turn says that the plaintiff is indebted to him, and he asks to have that taken into account, and adjudicated as a matter of set-off, and, if the set-off exceeds the amount of the plaintiff's claim, then an affirmative judgment is rendered for the defendant against the plaintiff. I adopt this analogy to ex-

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plain this situation, because the course of establishing a set-off in courts of justice is probably somewhat more familiar to you than this matter of counterclaim. The defendant sets up that by reason of the faulty construction of this building, and by reason of the failure of the plaintiff to go on and complete it in accordance with the terms of the contract, the defendant has been damnified,—that is to say, it is entitled to recover damages upon that ground, which are to be offset and deducted against any claim which the plaintiff may establish, and, if it exceeds any claim which the plaintiff may establish, then it asks to have an affirmative judgment for the defendant and against the plaintiff for that amount; and the object of permitting this to be done in a single suit is that a judgment one way or the other shall establish fully the rights of both parties in regard to the whole transaction, to obviate the necessity of two or more suits, one brought by the plaintiff and another by the defendant, in order to establish the entirety of their rights in reference to the subject-matter involved. This much by way of explanation of what a counterclaim is. That sort of a claim is set up by the defendant to this claim set up in the declaration, which is predicated upon the furnishing, by the plaintiff, of labor and materials which went into the construction of this building, or were appropriated for the purpose of completing it. That is the form in which the pleadings, which state the relative claims of the parties, stand. Then, second, the plaintiff claims to recover damages for being prevented from executing the contract for heating and ventilating this building, which is an independent matter. The defendant claims, not in terms, perhaps, in the pleading which has been filed, but which it is permitted to assert if there is ground for it under the general pleadings which it has put in, that this contract was abandoned, rescinded, and put an end to, and that, therefore, the plaintiff has no standing on which now to prosecute his claim for alleged damages on account of the breach of that contract,—the heating and ventilating contract."

During the progress of the trial in the court below counsel for the plaintiff in error requested the court, in writing, to give in charge to the jury 19 separate instructions or propositions, which request, as a whole, was refused by the court, and exception taken. In the concluding paragraph of the general charge to the jury, the circuit judge, in relation to these instructions so requested and refused, said: "Now, gentlemen, instead of following the language of these requests which have been handed up, I have thought it better to submit to the jury the views of the court upon the several branches involved, without distinct reference to the detailed requests which have been proffered. I have thought the labor of comparing the respective requests on the one side and the other and pointing out the distinctions and harmonizing them would tend to more confusion than to give the instructions in the court's own language. If, therefore, I have omitted any substantial matter, which counsel desire a request upon, I will attend to that now." The court was not requested to give any additional instructions, or to modify or change those given. The jury, under full instructions from the court in relation to every phase of the case, returned a verdict in favor of the defendant in error for the sum of $13,022.10, on which judgment was pronounced, and to revise that judgment the case comes to this court on writ of error.

M. L. Howell, for plaintiff in error.

Albert Crane, for defendant in error.

Before LURTON and DAY, Circuit Judges, and CLARK, District Judge.

CLARK, District Judge, after stating the case as above, delivered the opinion of the court.

There are 37 assignments of error to the rulings and instructions of the court below, but we do not find it necessary to consider these separately or in extenso. The exceptions to testimony taken by the plaintiff in error were based upon the proposition that the building committee was without authority to bind the county for extra work,

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the price of which constituted part of the amount sued for. As precisely the same point is presented in exceptions to the court's instruction to the jury, the assignment on these exceptions is not material, and we pass it with the remark that it is not in accordance with the rule of this court which requires that, "when the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected." The exception to the court's refusal to instruct the jury as requested is general. Several of the propositions included in this request are clearly unsound, and under such circumstances the exception is insufficient to compel a re-examination in this court. Felton v. Newport, 34 C. C. A. 470, 92 Fed. 470; Railroad Co. v. Callaghan, 161 U. S. 91, 16 Sup. Ct. 493, 40 L. Ed. 628; Bogk v. Gassert, 149 U. S. 17, 13 Sup. Ct. 738, 37 L. Ed. 631; Newport News & M. Val. Co. v. Pace, 158 U. S. 36, 15 Sup. Ct. 743, 39 L. Ed. 887; Railroad Co. v. Volk, 151 U. S. 73, 14 Sup. Ct. 239, 38 L. Ed. 78.

We further observe, in passing from this assignment, that the instructions refused are not set out totidem verbis, as the rule of this court requires. And this observation is equally applicable to the remaining assignments of error found in the record, the purpose of which is to raise questions on different parts of the court's instructions to the jury, without setting out, in conformity to that rule, the portion of the charge excepted to. Notwithstanding the failure to conform to the rule, we proceed to examine the only two assignments of error which raise questions of sufficiently serious import to call for separate consideration and determination; the other assignments being clearly untenable, if in proper form under the rule. In one of these assignments the following instruction is complained of as erroneous:

"If you find that his tender of performance by correcting the defects was made in good faith, inasmuch as he was prevented from going on with his contract by the board, the plaintiff is entitled to recover for what he had done in pursuance of the original contract, or any modification or incident thereof, which was authorized to be made by the contract itself, including the materials appropriated by the county; and the measure of damages is the fair and reasonable value of what was thus contributed by the plaintiff in labor and materials towards the construction of the building."

The contention of the plaintiff in error is that the proposition made by the defendant in error to correct any defects, and proceed with the execution of the contract, was coupled with the condition that certain sums claimed to be due should be first paid by the county; and the exception is that the above instruction treats the proposition as an unqualified one in the omission of any reference to the condition. We are not prepared to say that the offer was upon the condition suggested. But, conceding that the tender of performance was upon such condition, this was a circumstance for the consideration of the jury, along with the other facts and circumstances of the case, in determining whether the tender of performance was made in good faith. This instruction, so far as it went, was not incorrect, in view of the particular facts of this case. There was no request for any further instruction, or for any modifica-

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tion of the instruction as given, and, if the charge was not regarded as sufficiently full upon the facts, the attention of the court should have been called to the point by request for further instruction; and in the absence of such request the objection cannot be sustained. Railroad Co. v. Volk, 151 U. S. 73, 14 Sup. Ct. 239, 38 L. Ed. 78; Railroad Co. v. Cody, 166 U. S. 606, 17 Sup. Ct. 703, 41 L. Ed. 1132. Furthermore, the exception on which this assignment is based is to this entire paragraph in the charge, and was general, and did not specifically suggest or point out the defect or omission now complained of, so as to bring it distinctly to the attention of the court, and afford an opportunity to remedy the omission, if any existed. Under these circumstances the exception was insufficient, and the assignment unsustainable. Society v. Faulkner, 91 U. S. 415, 23 L. Ed. 283; Railroad Co. v. Varnell, 98 U. S. 479, 25 L. Ed. 233; Railway Co. v. Jurey, 111 U. S. 584, 4 Sup. Ct. 566, 28 L. Ed. 527; Newport News & M. Val. Co. v. Pace, 158 U. S. 36, 15 Sup. Ct. 743, 39 L. Ed. 887; Columbus Const. Co. v. Crane Co., 40 C. C. A. 35, 98 Fed. 946; O'Neil v. Vermont, 144 U. S. 323, 12 Sup. Ct. 693, 36 L. Ed. 450.

The remaining assignment of error which we notice is based on the contention that the extra work was done, and the extra materials furnished, pursuant to an agreement made with the building committee in the progress of the work, in accordance with the terms and provisions of the general contract. As we have stated, certain items of the account upon which this suit was brought are for extra work and materials. It is insisted that the board of supervisors was without power to appoint a building committee with a right to direct extra work or make changes in the building, although this was provided for in the general contract. It is insisted that this was an attempt on the part of the board of supervisors to delegate a power which belonged exclusively to it, and that it was without authority to appoint an agent or committee charged with the duty of supervising the execution of a general contract in its business details and requirements. The instruction of the circuit court in relation to this question, given in full, was as follows:

"Now, gentlemen, some question has been made during the progress of the trial as to the powers of the building committee to make changes, and add incidents, and it has been claimed—I do not know whether it is still insisted on—that it was not competent for the board of supervisors to delegate its authority to determine the extent to which the terms of the contract should be modified or extended in respect to the specifications and details of the work, and that the building committee did not possess such powers as it professed to execute; but, gentlemen, in view of the fact that this kind of business is very generally, if not universally, conducted after a somewhat similar method, growing out of the circumstance that the whole body of supervisors is large, an unwieldy class and lot, and the difficulty of getting them together and giving supervision and direction to work of this kind, I think it may be fairly assumed that the electors of the county, when they voted to have a court house, and raise the sum of $40,000 to pay for it, had in contemplation that the board of supervisors would delegate the authority which it possessed to a building committee, and that the work would be executed in accordance with the manner in which such work is usually done, and under such supervision as the requirements of the execution of such a building contract would indicate as the progress of the work went on,—as, for example, if it turned out, after they got started on the work, that, owing

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to the nature of the soil under the building, it was necessary to deepen the foundations and widen them, so as to give greater resistance from the earth to the construction above it, I think it would be within the scope and power of the building committee to attend to such variations as were necessary in the interest of the county to make things solid and sound; and certainly, if the board of supervisors did not intervene seasonably, and raise some objection to the course that was being pursued, I think it would not be competent after that to deny the power of the building committee to make such changes; and I am inclined to think that the same result would occur independently of any action or acquiescence on the part of the board of supervisors. In other words, that the building committee was intrusted with the authority to make such changes as the progress of the work indicated were necessary for the sound construction of the building, within, of course, the general limits of the expenditure authorized by the county at large. I will here refer more at length to a branch of the subject which I have incidentally alluded to already, and that is to the necessity, in order to bind the county, of directing construction, or for modification or addition to the work by the building committee. I repeat that it is not strictly absolutely necessary that the direction should have preceded the beginning of the work in order to make it authorized. If, during its construction, it is concurred in, and approved, and allowed to go forward upon the assumption of its necessity or propriety, it would have the same effect as if it had been previously directed. This, gentlemen, applies to quite a number of the items detailed in this case, and, without making a specific application of this rule to the specific instances, I will give you this general instruction, and you can apply it for yourselves."

We think the instruction thus given is sound in principle, and sustained by the weight of authority. Reuting v. City of Titusville, 175 Pa. 512, 34 Atl. 916; Kramrath v. City of Albany, 127 N. Y. 575, 28 N. E. 400; Shea v. Milford, 145 Mass. 529, 14 N. E. 764; Collins v. Holyoke, 146 Mass. 298, 15 N. E. 908; Hitchcock v. City of Galveston, 96 U. S. 341, 24 L. Ed. 659; Holland v. State, 23 Fla. 123, 1 South. 521. In 7 Am. & Eng. Enc. Law (2d Ed.) 988, the general rule and the limitation to the rule are thus stated:

"It is an elementary rule that, when authority is conferred on public officials to do acts which involve the exercise of judgment and discretion, the execution of that authority cannot be delegated to others; and this principle is applicable to boards of county supervisors or commissioners. But the usual limitation to the rule against the delegation of power obtains, and the board may delegate purely ministerial and executive duties, the discharge of which does not call for the exercise of reason or discretion."

Numerous cases are cited in support of the text which recognize or apply this established limitation to the rule. The distinction on which the cases proceed is between the original exercise of a power involving judgment and discretion and the mere performance of ministerial and business acts relating to details and in the supervision of the work. In this case the board of supervisors had determined to exercise the power and authority to construct a county court house, and for that purpose had executed a contract containing all such general provisions as could safely enter into such a contract, the cost of which was kept well within the $40,000 authorized to be expended in that regard. Such duties as were devolved upon the building committee, architect, and superintendent related to the proper execution of this general contract in its details, and to such variation in details as might become necessary in the progress of the work. There is nothing in the law of Michigan which in express terms or by fair implication denies to the board of supervisors this very necessary power to devolve on a suit-

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able committee, architect, or superintendent ministerial duties in relation to business acts in the execution of the general contract, and a doctrine which would deny such power would render the work of a board like this burdensome, difficult, and unsatisfactory. The difficulty of the board acting in relation to every detail is quite apparent, to say nothing of the lack of necessary skill and special attention. The distinction between the exercise of original power involving judgment and discretion as to whether a public enterprise shall be undertaken and the performance of merely executive and business acts in relation to details of execution is very well brought out in the cases of Kramrath v. City of Albany, 127 N. Y. 575, 28 N. E. 400; Holland v. State, 23 Fla. 123, 1 South. 521; Hitchcock v. City of Galveston, 96 U. S. 341, 24 L. Ed. 659. See, also, Plummer v. Kennedy, 72 Mich. 295, 40 N. W. 433; and 1 Beach, Pub. Corp. § 279, and cases cited.

Certain cases decided by the supreme court of Michigan are relied on as supporting the contention of plaintiff in error. Of these cases Campau v. City of Detroit, 106 Mich. 414, 64 N. W. 336, most strongly favors the view of plaintiff in error. In that case the plaintiff had contracted with the city of Detroit to build a sewer between designated points, and according to certain plans, for a specified price. The city charter provided that no contract should be made for a public work unless approved by the council, and that all contracts for the construction of sewers and other public works should be let to the lowest responsible bidder. When the construction of the sewer was properly ordered, the board of public works was required to advertise for proposals to execute the work according to plans and specifications required to be on file, and to supervise the work. It was held that after the execution of the contract the board of public works was without authority to make substantial changes in the terms of the existing contract without the approval of the city council, and that the contractor could not recover extra compensation from the city on account of variations from the plan of the work made by the direction of the board of public works. After reference to certain sections of the charter and laws of Detroit materially affecting the question, the court said:

"It is apparent from these provisions of law that the legislature has sought to guard against the making of contracts except by awarding them to the lowest bidder, and, by providing that the contracts shall be let in accordance with the plans and specifications, has erected a safeguard against such substantial departures as that in the present case. Similar provisions of municipal charters have been considered by the court in a number of cases. In City of Detroit v. Michigan Pav. Co., 36 Mich. 335, it was held that the city could not be held for the expense of a public improvement, except under express contract conforming to charter conditions, and was not liable upon an implied contract. * * * Any other rule would open the door in every case to an evasion of the statute; for, when a substantial departure is made, if it may be lawfully made by the board, and bind the city, the compensation provided by the contract is no longer controlling, and a deviation which a jury may say is substantial would entitle the contractor in every case to recover on the quantum meruit."

It is apparent that this decision was rested on the sole ground that the provisions in the charter and laws of Detroit, requiring that the work should be let to the lowest responsible bidder, and in

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accordance with plans and specifications, was inconsistent with the power to increase the cost of construction by authorizing extra compensation in consequence of substantial changes in the plans and specifications, by which the manifest purpose of the statute would be defeated. The judgment evidently proceeded upon the ground that the power to make substantial changes and contract for extra compensation was forbidden by necessary implication in the charter provision that the work should be let to the lowest responsible bidder, and according to previously prepared plans and specifications. The case is therefore clearly distinguishable from the one at bar, in which there is no statutory limitation or restriction similar in terms or effect to the one on which the ruling rested in Campau v. City of Detroit, 106 Mich. 418, 64 N. W. 336.

The distinction between the exercise of powers requiring judgment and discretion and the performance of merely ministerial duties in relation to detail was not under consideration in any other Michigan case to which we have been referred; and certainly none of these cases deny the distinction, which is now fully recognized and established by well-considered cases in other jurisdictions. Upon the whole case, we conclude that there is no error in the record prejudicial to the plaintiff in error. Judgment affirmed.

(107 Fed. 371.)

COCHRAN et al. v. SCHREIBER.

(Circuit Court of Appeals, Fifth Circuit. March 19. 1901.)

No. 1,010.

1. TRESPASS TO TRY TITLE—VERDICT—CONSTRUCTION—SUFFICIENCY TO SUPPORT JUDGMENT.

In trespass to try title, plaintiff claimed a described portion of lot 14, according to the T. survey, which subdivided a grant into lots. The statute of limitations was pleaded as a defense, but the underlying issue was whether such survey was actually made on the ground, and was valid, and should prevail, as to boundaries and lot lines, over a subsequent survey. The verdict was in favor of plaintiff "for the land in controversy, except that part of the northwest part of lot 14" which a defendant named had inclosed. It further found "for the defendant the small triangular shaped piece of land situate in said northwest corner of said lot 14, showing a width of about 16 feet on the north line of said lot 14, and running to a point in the west line of said lot 14 about 200 feet south of the northwest corner of said lot 14." *Held*, that the lot 14 referred to must be the lot 14, as bounded and described in the T. survey; that the triangular piece described in the second clause of the verdict was intended to be identical with the exception in the first clause; and that the word "about," twice used in the second clause, should be rejected as surplusage, so far as it tended to render the verdict vague or uncertain; and that, as thus construed, the verdict was not so vague, uncertain, and indefinite as to afford no basis for a valid judgment.

2. SAME—REVIEW ON APPEAL.

If, in trespass to try title, there is anything in the evidence regarding lot lines or fences or other matters tending to render the verdict vague or uncertain, it cannot be inquired into on an appeal raising a question as to its sufficiency in such respects; that being a matter to be dealt with by the trial court on a motion for a new trial.

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8. REVIEW—DIRECTION OF VERDICT—REFUSAL—CONFLICTING EVIDENCE.
Where the evidence was uncertain and conflicting as to a material fact, and left the question in doubt, there was no error in refusing to peremptorily direct a verdict.

In Error to the Circuit Court of the United States for the Eastern District of Texas.

E. B. Parker, Jas. A. Baker, and R. S. Lovett, for plaintiffs in error.

C. B. Martin, P. K. Ewing, and G. W. Tharp, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. This is an action at law, in the nature of trespass to try title to 60 acres of land, a part of the Luke Moore survey (a league of land), situated near the city of Houston, in Harris county, Tex. The suit was instituted on October 6, 1897, by Charles Schreiber, the defendant in error, against Jerome B. Cochran, W. J. Settegast, Jr., and Wilhelmine Helmke, the plaintiffs in error, and the controversy resolved itself at last into a question of surveys and boundaries. The patent from the Mexican government to Luke Moore—of which the property in controversy is a part—bears date August 13, 1824. The Luke Moore survey is bounded on the west by the Tierwester survey, on the north by the S. M. Williams survey, on the northwest by the Wells survey. The northwest corner of the Luke Moore survey is a common corner for the Luke Moore survey, the Tierwester survey, the Wells survey, and the Williams survey. In 1838, Henry Trott, a surveyor residing in Houston at that time, subdivided the Luke Moore survey into lots of various sizes, and on the 15th day of June, 1838, a plat of these subdivisions, as prepared by him, was recorded in the record of deeds for Harris county, where it has remained from that day until now. The defendant in error claims that the plat made by Trott was the result of an actual survey of the land, while the plaintiffs in error claim that it is what is usually known as a "chimney-corner" survey, and not the result of an actual survey. The petition is in the ordinary form of trespass to try title, and the property in controversy is described therein by metes and bounds, as follows, to wit:

"Sixty acres of land, more or less, out of the Luke Moore league, and more particularly described as all that portion of lot No. 14 lying westward of the county road, of the Henry Trott subdivision of the west half of said league, beginning at an iron peg set at the corner of lots 10, 11, 13, and 14, from which a pin oak 12 inches in diameter, marked 'I,' bears S., 25½ degrees E., 42½ feet distant; also 646 feet S., 20 degrees W., of a fore and aft elm, standing on the line between lots 10 and 11; thence S., 70 degrees E., along the line dividing lots 11 and 14, 280½ feet, to a point in the center of the county road; thence S., 15 degrees 45 minutes E., 442 feet, to a point in the center of said county road; thence S., 20 degrees W., along the center line of the aforesaid county road, 4,840 feet, to a point on the north bank of Bray's Bayou, at the mouth of a small drain; thence up said Bray's Bayou, following the meanders of the same, to Siewerson's S. E. corner, being the common corner of lots 13 and 14; thence N., 20 degrees E., along the line dividing said lots No. 13 and 14, and following said Siewerson's line to his N. E. corner, passing the same at 2,540 feet, at 5,106½ feet, to the place of beginning. Said

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property is also described in a deed to plaintiff as lots 1, 5, 6, 10, 13, 14, 19, 20, 24, 25, 28, and 29 out of lot No. 14 of the west half of the Luke Moore league, according to plat in record of deeds for Harris county, Texas."

The defenses are (1) general demurrer and general denial; (2) plea of not guilty; (3) that the property in controversy is not part of lot 14, as claimed by defendant in error; (4) statute of limitation of five years; (5) statute of limitation of ten years.

Under the statutes of Texas, the defendant in the court below, under a plea of not guilty, may put in any defense except the defense of limitations, which must be specially pleaded. Under plea of not guilty, the plaintiffs in error offered evidence tending to prove that about the year 1860 Charles Kulbow, through whom the defendant in error claims, acquired the title to lot 14, and that about the year 1862 Christian Helmke, through whom the plaintiffs in error claim, acquired the title to lot 13; that soon thereafter the said Charles Kulbow and Christian Helmke agreed upon a dividing line between said two lots, and that ever since the making of such agreement, continuously until now, both of the parties thereto, and those claiming through them, had acquiesced in and recognized such dividing line. Plaintiffs in error asked a peremptory charge upon this issue of an agreed line, but the court refused the charge, and submitted the question to the jury. The plaintiffs in error also offered evidence tending to prove that soon after acquiring lot 13, to wit, about the 18th day of June, 1860, Christian Helmke built upon and improved the north part thereof, including the south end of lot 10, also owned by him; that, in erecting his fences and other improvements, he inclosed a small portion of the property in controversy; and that continuously, since 1860, the said Christian Helmke, and those claiming through him, including the plaintiffs in error, had held the actual, adverse, peaceable, open, notorious, and exclusive possession of said property, claiming to the boundaries of the property in controversy, and all the time claiming, using, and enjoying said land as their property. The plaintiffs in error, under their plea of 10 years' limitation, asked the court below to instruct the jury peremptorily to find for plaintiffs in error. This the court refused to do, but submitted the issue of limitation, as well as all other controverted issues, to the jury.

Upon the pleadings as stated, the issues were submitted to the jury, who heard the evidence from day to day, six in all, and thereafter, on the 1st day of March, 1900, returned into court the following verdict:

"We, the jury, find for the plaintiff for the land in controversy, except that part of the northwest part of lot 14 that Mrs. Wilhelmine Helmke has inclosed in her present fence. We find for the defendants the small triangular shaped piece of land situated in said northwest corner of said lot 14, showing a width of about 16 feet on the north line of said lot 14, and running to a point in the west line of said lot 14, about 200 feet south of the northwest corner of said lot 14."

In due time plaintiffs in error filed motion for new trial, which was overruled. A bill of exceptions was allowed and filed, and the cause brought to this court by plaintiffs in error.

The assignments of error upon which plaintiffs in error rely are:

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"(1) That the verdict of the jury is so vague, uncertain, and indefinite it cannot form the basis of a valid judgment. (2) That upon the issue of an agreed line claimed by plaintiffs in error to have been established and fixed by and between Charles Kulbow and Christian Helmke, and continuously thereafter recognized by them, the evidence is uncontradicted; therefore the jury should have been instructed peremptorily to find for plaintiffs in error. (3) That, upon the issue of ten-years limitation, the testimony is uncontradicted that the plaintiffs in error, and those through whom they claimed, went into possession of a portion of the property in controversy in 1862, and continuously thereafter used and occupied the same, claiming to the boundaries thereof, and therefore the jury should have been peremptorily instructed to find for plaintiffs in error."

The underlying issue in the case was whether the Trott survey and plat of the Luke Moore grant, under which the plaintiff below claimed, was a genuine, valid survey, and should prevail as to boundaries and lot lines over the Powers-Gillespie survey, made 22 years later, which varied from the Trott survey in respect to the west boundary of the grant and of the lots in controversy 125 varas. This issue was submitted to the jury without objection, under the following instructions:

"The rule in regard to establishing boundary lines is that if from the evidence the jury believe that the survey was made, and was actually made upon the ground, and the land was plotted and sold with reference thereto, that the parties so purchasing hold the land so established upon the ground, and, if possible, from the evidence, it is the duty of the jury to follow the footsteps of the surveyor. But if from the evidence the jury don't believe that the land was actually surveyed upon the ground, and the subdivision lines actually run and marked and established, then it would be regulated ordinarily, in the absence of the agreement of parties, by course and distance. Therefore, in deciding this case, you will determine, first, whether or not the land in dispute was actually surveyed on the ground, and the boundary lines established thereon, by Henry Trott; and, if you decide that it was actually surveyed upon the ground, then you are to decide from all the evidence in the case where the true dividing line was between lots 13 and 14; and, if you believe from the evidence that it was in accordance with the plaintiff's contention, your verdict should be for the plaintiff, unless you find as hereinafter instructed. But if you find that it was actually surveyed upon the ground, but is in accordance with the contention of the defendants, in that event your verdict should be for the defendants. As stated, the plaintiff's contention is that this west half of the Luke Moore survey was surveyed for a plot by Henry Trott, and the lines marked and established upon the ground. That is the plaintiff's contention, and, if you find that to be the fact, then the lines would run in accordance with that survey, it being the older survey, and the parties' right would be determined by wherever you may decide or find from the evidence those lines to exist upon the ground. But if Henry Trott didn't survey it on the ground, and it was simply an office survey, or paper survey, then you are to determine from the evidence offered whether it was subsequently surveyed by any one else,—Powers, or any other person. If you believe from the evidence Trott did not actually survey it upon the ground, but that Powers did actually survey it upon the ground, and marked the division lines between the respective lots, in that event you would hold to those lines. It is for you to determine, from all the evidence offered, if this ground was actually surveyed. If you determine it was actually surveyed, you are to determine who surveyed it. If Trott surveyed it, then, in the absence of any agreement between the parties, or the defeat of anybody's right by the statute of limitations, the parties would hold to the Trott lines. But if Trott did not actually survey it, but Powers did actually survey it, then, in the absence of an agreement or defeat of statute of limitation or otherwise, the parties would go to the Powers line. If you find from the evidence that Trott did not survey it upon the ground, then you are to determine from the evidence whether or not Powers surveyed it upon the ground. If Powers did not sur-

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vey it upon the ground, then you are to determine, from all the evidence offered before you, as to where the true lines were. But, if you determine Powers did survey it upon the ground, then the parties' right will go to those lines, unless they were defeated by reason of some other matter."

Under these and other instructions not bearing on the survey question, the jury found "for the plaintiff for the land in controversy, except," etc. Now, as the plaintiff below in his petition claimed under the Trott survey, and as under the instructions above given a verdict in his favor could only be returned in case the jury found the Trott survey to have been actually made on the ground, it is very certain that the lot 14 referred to in the verdict is the lot 14 as bounded and described in the Trott survey. We think it apparent on the face of the verdict that the triangular shaped piece of land found for the defendants in the last clause is and was intended to be identical with the excepted part from the lands in controversy described in the first clause as "that part of the northwest part of lot 14 that Mrs. Wilhelmine Helmke has inclosed in her present fence."

The word "about," twice used in the last clause of the verdict in connection with the description of the lots, is to be rejected as surplusage, so far as it tends to render the verdict vague or uncertain. Bodley v. Taylor, 5 Cranch, 224, 3 L. Ed. 75; Johnson v. Pannels' Heirs, 2 Wheat. 206, 4 L. Ed. 221; Shipp v. Miller's Heirs, 2 Wheat. 316, 4 L. Ed. 248.

The trial court did not apparently have any difficulty in rendering an intelligent judgment, based on the verdict and the pleadings in connection therewith, and the judgment so rendered seems correct in all respects. If there was anything in the evidence with regard to lines or fences or other matters which tended to render the verdict vague and uncertain, it is a matter wholly beyond our inquiry, and could only have been dealt with by the trial court on a motion for a new trial.

The second contention of the plaintiffs in error seems to be in the nature of an appeal from the trial court and jury on a question of fact. The instruction given the jury on the issue of an agreed boundary line was lucid and full, so far as the law involved was concerned, and appears only to have been objected to on the ground that the court did not go further, and, for the reason that the evidence was uncontradicted and established the agreed boundary line as claimed by the defendants, instruct the jury peremptorily to find for the defendants. Evidently, neither the jury nor the trial judge considered the evidence undisputedly in favor of the defendants; for the one found, and the other sustained, a verdict to the contrary.

The case was argued in this court by counsel on both sides, who did not participate in the trial before the jury, and their briefs are so conflicting that to determine the facts proved an examination and analysis of the entire evidence, as presented in 376 printed pages of the transcript, has been rendered necessary. From our examination, we conclude that the question was not so much that of an agreed boundary as of a boundary acquiesced in, and in re-

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gard to which the evidence of the defendants below is from interested sources, and is uncertain, inferential, and somewhat conflicting in itself, and that the evidence offered by the plaintiff below in opposition tends directly to contradict and partially overthrow the defendants' pretension as to either an agreed or an acquiesced in boundary. To recapitulate the evidence, and point out in full the discrepancies, uncertainties, and conflicts, would take more space and time than we are disposed to give, and would, besides, be of no value in any other case.

As we find the evidence was uncertain and conflicting, and that the question, under all the authorities, ought not to have been withdrawn from the jury, we do not feel called upon to review the many decisions cited and dealing with the question when and under what circumstances should the trial court withdraw a case from the jury and peremptorily direct a verdict.

As to the third contention, that the proof was uncontradicted in regard to the 10-years statute of limitation, we find from an examination of the evidence that the question of exactly what and how much Mrs. Helmke and her successors occupied and possessed and exercised ownership over under a claim of title is as much in doubt as the question of an agreed boundary, and that under all the circumstances it was a matter very properly left to the jury. The judgment of the circuit court is affirmed.

(107 Fed. 376.)

SMYTHE et al. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. March 19, 1901.)

No. 950.

1. SUPERINTENDENT OF MINT—LOSS OF PUBLIC MONEYS—LIABILITIES ON BOND.
   Whether the superintendent of a mint was at fault or not, he and his sureties are liable on his bond "for the faithful discharge of his duties" for the loss by fire of public moneys which the law required him to keep safely, and pay over when required.
2. SAME—ACTION FOR LOSS—RIGHT TO CREDIT.
   In an action against the superintendent of a mint for a loss of public moneys, he is not entitled to a credit where the claim therefor was not shown "to have been presented to the accounting officers of the treasury, and to have been disallowed in whole or in part," etc., as required by Rev. St. § 951, as a condition precedent to its being admitted on the trial.
3. SAME—DEFENSE—PLEA OF NO DAMAGE.
   No damage is not a good plea in defense to an action against a mint superintendent to recover on his official bond, conditioned "for the faithful discharge of his duties," for a loss by fire of moneys which his bond required him to keep safely, and pay over when required.
4. SAME—RECOVERY OF BOND—INTEREST.
   On recovery on a mint superintendent's bond for a loss of public moneys which he was required to keep safely and turn over when required he should be charged with interest thereon from the date of their receipt until repayment, as provided by Rev. St. § 3624, in relation to all judgments obtained in suits to recover public moneys from persons accountable therefor, and who neglect or refuse to pay into the treasury the sum or balance due.

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In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

John D. Rouse, Wm. Grant, W. W. Howe, W. B. Spencer, Chas. Cocke, and E. H. McCaleb, for plaintiffs in error.

F. B. Earhart, for defendant in error.

Before SHELBY, Circuit Judge, and NEWMAN and TOULMIN, District Judges.

TOULMIN, District Judge. This is a suit brought by the United States against Andrew W. Smythe and the sureties on his official bond, as superintendent of the United States mint at New Orleans, to recover $25,000, which it is alleged he received and failed to account for, as required by the condition of his bond. The defendants excepted to the petition on the ground that it did not state a cause of action. The exception was referred to the merits by order of the circuit court. Thereupon the defendants filed answers of a general denial of the allegations of the petition, and specially that the $25,000, the alleged deficiency of defendant Smythe sued for, was occasioned by a fire in no way attributable to said Superintendent Smythe or his employés, which occurred in the vault of the cashier of the mint, by which event the said sum, in the currency of the United States, was burned and destroyed; that the box containing the same was turned over to the agents and representatives of the plaintiffs for examination and investigation; and that because of the destruction of said currency by fire the defendants were in no way liable in this suit. Much evidence was offered pro and con upon the issues presented by the answers, but the evidence was without dispute that there was a deficiency of $25,000, as shown by defendant Smythe's account with the government, of the moneys received by him as superintendent of the mint. It also showed that the government, by its representative, took possession of the box referred to, and that its expert was able to identify $1,182 of charred currency therein, and that the same is still in possession of the government, and deposited in said mint. There was no exception to, or motion to strike out, the special defense set up in the defendants' answer, and there was no objection to the introduction of evidence in support of that defense. On the conclusion of the evidence the court, on motion of counsel for the plaintiffs, directed a verdict for the plaintiffs, and refused all charges requested by the defendants. Judgment having been given for the plaintiffs, the defendants bring the case here, and assign errors which raise the following points, to wit: (1) If the money representing the deficiency sued for was destroyed by fire, and such fire was not caused by the fault or negligence of defendant Smythe, the plaintiffs are not entitled to recover. (2) If the alleged deficiency of $25,000 was contained in a box in the vault of the mint, in the form of United States treasury notes, and all said money was destroyed by fire while so contained in said vault, and the remains and débris thereof were delivered by Smythe to the representative of the United States government who was authorized to receive it, a verdict for the plaintiffs

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cannot exceed nominal damages. (3) The defendants are entitled to credit for all the burnt or charred money identified and turned over to the United States government. (4) The defendants were only liable for interest upon the principal from the date of the demand for the same upon the sureties on Smythe's bond, to wit, from February 9, 1894, and not from April 1, 1893, the day the money was received by Smythe, as allowed by the judgment.

Since the case of U. S. v. Prescott, 3 How. 578, 11 L. Ed. 734,—the first case that came before the supreme court involving the question of liability of a receiver of public moneys,—down to the present time, the court has uniformly held, as a general proposition, that a bond of an officer charged with the receiving and safe-keeping of public moneys until they are legally withdrawn or paid out creates an absolute liability for the moneys that come to his hands. It has always regarded such officer as an insurer of the public money in his hands, and has held that he and his sureties cannot escape liability therefor, although it is stolen, or lost, or taken by robbery, and without his fault. Where the condition of his bond is to account for and pay over money, or words to that effect, or the condition is to faithfully perform the duties of an office, and a statute describes the duties to similar effect, the officer has been held a virtual insurer of funds coming regularly into his hands, and therefore accountable for an unavoidable loss. In U. S. v. Prescott, supra, the suit was on the official bond of a receiver of public moneys. The defense was that the money had been stolen from the defendant without his fault or negligence. The court said:

"This is not a case of bailment, and, consequently, the law of bailment does not apply to it. The liability of defendant Prescott arises out of his official bond and principles which are founded on public policy."

There is no principle on which such a defense can be sustained. The obligation to keep safely the public money is absolute, without any condition, express or implied, and nothing but the payment of it when required can discharge the bond.

In U. S. v. Morgan, 11 How. 154, 13 L. Ed. 643, the suit was against a collector of customs on his bond for treasury notes received by him. The defense was that they had been lost or purloined without his knowledge or consent. The court held that this was no excuse, and that the defendant was liable for the notes on his bond, and not on any original bailment.

In U. S. v. Dashiel, 4 Wall. 182, 18 L. Ed. 319, a paymaster in the United States army was sued on his official bond "for the faithful discharge of his duties." His duty was to safely keep all public moneys in his charge, and pay them over when required to do so. The defense was that the money had been stolen from him. It was held that this did not exonerate him.

In U. S. v. Keehler, 9 Wall. 83, 19 L. Ed. 574, the court said "that in an action on an official bond the right of the government did not rest on the implied contract of bailment, but on the express contract found in the bond."

The case of Boyden v. U. S., 13 Wall. 17, 20 L. Ed. 527, was that of a receiver of public moneys, who was sued on his bond. The court said:

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"Were a receiver of public moneys, who has given bond for the faithful performance of his duties as required by law, a mere ordinary bailee, it might be that he would be relieved by proof that the money had been destroyed by fire, or stolen from him, or taken by irresistible force. He would then be bound only to the exercise of ordinary care, even though a bailee for hire. The contract of bailment implies no more, except in the case of common carriers. He may, however, make himself an insurer by express contract, and this he does when he binds himself in a penal bond to perform the duties of his office without exception. There is an established difference between a duty created by law and one to which is added the obligation of an express undertaking. The law does not compel to impossibilities, but it is a settled rule that, if performance of an express engagement becomes impossible by reason of anything occurring after the contract was made, though unforeseen by the contracting parties, and not within his control, he will not be excused. The rule has been applied rigidly to bonds of public officers intrusted with the care of public moneys. Such bonds have almost invariably been construed as binding the obligors to pay the money in their hands when required by law, even though the money may have been lost without fault on their part."

The defense set up in the case was that the receiver had been robbed of the public money received by him. The court said:

"If, as we have seen, his liability is to be measured by his bond, and that binds him to pay the money, then the cause which renders it impossible for him to pay is of no importance, for he has assumed the risk of it."

In Bevans v. U. S., 13 Wall. 56, 20 L. Ed. 531, the court said:

"It is not to be overlooked that Bevans was not an ordinary bailee of the government. Bailee he was undoubtedly, but by his bond he had insured the safe-keeping and prompt payment of the public money which came into his hands. His obligation was therefore not less stringent than that of a common carrier, and in some respects it was greater."

The learned counsel for the plaintiffs in error substantially concede in their argument that until the case of U. S. v. Thomas, 15 Wall. 337, 21 L. Ed. 89, the supreme court had expressed views adverse to their position in this case, but contend that in the Thomas Case the court decided that the liability of a fiscal officer of the United States was that of a simple bailee, notwithstanding the conditions contained in a bond of the character of the one here involved. We do not agree with this contention. We find nothing in the Thomas Case overruling the former decisions of the court on the question involved in this suit. Mr. Justice Bradley, speaking for the court, said:

"This precise question has not yet been decided by this court. As the Rebellion has been held to have been a public war, the question may be stated in a more general form, as follows: Is the act of a public enemy in forcibly seizing or destroying property of the government in the hands of a public officer, against his will and without his fault, a discharge of his obligation to keep such property safely, and of his official bond, given to secure the faithful performance of that duty, and to have the property forthcoming when required?"

—And decided that the seizing by a public enemy in a state of war of public moneys in the hands of a loyal government agent, against his will, and without his fault, was a sufficient discharge from the obligations of his official bond. We do not find, as claimed by counsel, that the court held "that the liability of a fiscal officer of the United States was that of a simple bailee." In the course of the opinion Mr. Justice Bradley said that such fiscal officers are nothing but bailees, and added:

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"But they are special bailees, subject to special obligations. It is evident that the ordinary law of bailment cannot be invoked to determine the degree of their responsibility. This is placed on a new basis. To the extent of the amount of their official bonds, it is fixed by special contract; and the policy of the law as to their general responsibility for amounts not covered by such bonds may be fairly presumed to be the same."

Referring to some of the cases herein cited by us, he said:

"But in none of them was the defense of overruling necessity interposed. They were all cases of alleged theft, or robbery, or some other cause of loss, which would have been insufficient to exonerate a common carrier from liability. They all concur in establishing one point, however, of much importance,—that a bond with an unqualified condition to account for and pay over public moneys enlarges the implied obligation of the receiving officer, and deprives him of defenses which are available to an ordinary bailee."

In some of the cases cited by us the court has, in effect, held that, while a receiver of public moneys is a bailee, he is not an ordinary bailee, and his obligations and liability do not depend on the law of bailments, but are measured by his bond. His liability is not unlike that of a common carrier, who is responsible for all losses except they be occasioned by the act of God or the public enemy. Our understanding of the language used in the Thomas Case is to the same effect.

Irrespective of the views hereinabove expressed as to the defendants' liability, we think the undisputed evidence showed such want of care on the part of the superintendent's cashier as to have justified the circuit court in directing a verdict for the plaintiffs. The official bond of the defendant Smythe was conditioned for the faithful discharge of his duties. Among those duties was the control of the mint under his official charge, and the safe-keeping, until legally withdrawn, of all moneys in his custody. Rev. St. §§ 3503, 3506. He is not relieved from liability to the United States for acts, omissions, or negligence of his subordinates or employés. Rev. St. § 3501. The duties prescribed by the statute are as much a part of the condition of his bond as if the same were written therein. 4 Am. & Eng. Enc. Law (2d Ed.) 681, and authorities cited in note 2. Under Rev. St. § 951, in suits like this "no claim for a credit shall be admitted upon trial, except such as appear to have been presented to the accounting officers of the treasury, and to have been disallowed in whole or in part," etc. In this case there was no proof that any claim for credit or set-off was ever presented to the proper officers and disallowed. U. S. v. Fletcher, 147 U. S. 664, 13 Sup. Ct. 434, 37 L. Ed. 322; Yates v. U. S., 32 C. C. A. 507, 90 Fed. 57. Besides, where a bond is not one to indemnify against damage, but an affirmative covenant to do specific things, non damnificatus, or no damage, is not a good plea. 3 Enc. Pl. & Prac. 663, and authorities in note 1. In suits on claims of this character, interest of 6 per centum per annum from the time of receiving the money until it shall be repaid is recoverable. Rev. St. § 3624. We find no error in the ruling of the circuit court, and its judgment is affirmed.

NEWMAN, District Judge. I concur in the judgment of the court in this case because I think under the evidence the circuit court was clearly justified in directing a verdict for the plaintiffs. The evi-

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dence not only failed to show proper care of the funds in the hands of the superintendent of the mint, but showed actual negligence on the part of the cashier, which negligence of his subordinate must be charged to the superintendent in this suit.

I do not believe that the liability of public officials on their bonds, for funds in their hands, is as strict and severe as my Brethren hold it to be, and, even if so strict a rule prevailed formerly, it was very much modified by the decision of the supreme court in the case of U. S. v. Thomas, 15 Wall. 337, 21 L. Ed. 89, as I read that decision. While it is undoubtedly true that public policy requires quite a strict rule against the holders of public money, it does not, in my opinion, go to the extent announced in the opinion of the majority of the court. But, on the facts in this case, the action of the circuit court in giving peremptory instructions for the plaintiffs was right, and the judgment, for that reason, should be affirmed.

(107 Fed. 381.)

REYNOLDS et al. v. LILLY.

(Circuit Court of Appeals, Fifth Circuit. April 9, 1901.)

No. 952.

APPEAL AND ERROR—BILL OF EXCEPTIONS—TIME—FAILURE TO EXECUTE—SCOPE OF REVIEW.

Where a bill of exceptions on appeal to the United States circuit court of appeals was presented to the trial judge for allowance and signature within the time as extended, but it was not signed, or its execution perfected, within the time, the only question that can be considered on an appeal is whether the complaint warranted the judgment rendered in favor of plaintiff.

In Error to the Circuit Court of the United States for the Northern District of Alabama.

Lee Cowart, for plaintiffs in error.

Wm. L. Martin, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. Section 4137, Code Ala. 1896, reads as follows:

"Any person who cuts down, deadens, girdles, or destroys, or takes away, if already cut down or fallen, any cypress, pecan, oak, pine, cedar, poplar, walnut, hickory, or wild-cherry tree, or sapling of that kind, on land not his own, willfully and knowingly, without the consent of the owner of the land, must pay to the owner ten dollars for every such tree or sapling; and for every other tree or sapling not hereinbefore described, so cut down, deadened, girdled, destroyed or taken away by any person, he must pay to the owner the sum of five dollars."

This action was commenced under the above statute by filing in the circuit court the following complaint:

"Geo. C. Lilly, Plaintiff, versus Henry C. Reynolds and William B. Reynolds, Dfts.

"The plaintiff, who is a citizen of the state of Tennessee, claims of the defendants, who are citizens of the state of Alabama, the sum of five thousand

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seven hundred and twenty-five dollars, for that the said defendants willfully and knowingly, and without the consent of the plaintiff, did cut down five hundred and sixty-nine oak, pine, and hickory trees, or saplings of that kind, and seven black gum and chestnut trees, or saplings of that kind, on the following described tracts of land, to wit: The S. E. quarter of the N. W. quarter, and the east half of the southwest quarter, and the west half of the southeast quarter, all in section 2, township 24, range 12 east, in Shelby county, Ala., which said lands, at the time said trees were so cut by the defendants, did not belong to the defendants, but belonged to the plaintiff."

The defendants were duly summoned on November 12, 1898, and on December 7, 1899, the cause came on to be heard before a jury, whereupon came the defendants in open court, and pleaded the general issue, and the further hearing of the cause was continued until December 8, 1898, on which day, on leave of the court, plaintiff was allowed to file an amendment to the complaint as follows:

"The plaintiff, by leave of the court, amends his complaint by adding thereto the following counts: (2) The said plaintiff claims of the said defendants the sum of five thousand seven hundred and twenty-five dollars, for that said defendants willfully and knowingly, and without the consent of the plaintiff, did cut down or carry away five hundred and sixty-nine oak, pine, and hickory trees or saplings, and seven black gums and chestnut trees, or saplings of that kind, on the land described in the original complaint, which said land, at the time said trees were so cut and carried away by the defendants, did not belong to the defendants, but belonged to the plaintiff. (3) The said plaintiff claims of the said defendants the sum of five thousand seven hundred and twenty-five dollars, for that said defendants willfully and knowingly, and without the consent of the plaintiff, did take away five hundred and sixty-nine oak, pine, and hickory trees, or saplings of that kind, and seven black gum and chestnut trees, or saplings of that kind, which had already been cut down or fallen on the land described in the original complaint in this cause, which said land, at the time said trees were so taken away by the defendants, did not belong to the defendants, but belonged to the plaintiff."

After filing this amendment, the defendants interposed the same plea,—the general issue. Thereupon came a jury, and, after listening to the testimony advanced, argument of counsel, and charge of the court, the jury returned a verdict in writing as follows: "We, the jury, find for the plaintiff, and assess his damages at $5,725;" whereupon the court rendered judgment against the defendants, Henry C. Reynolds and William B. Reynolds, in the sum of $5,725 and costs. On December 23, 1899, the defendants filed a motion for a new trial, based on some 19 different grounds, not necessary to recapitulate. The further hearing of the same was postponed until December 30, 1899, when the court entered an order as follows:

"It is ordered by the court, unless plaintiff enters a remittitur before the adjournment of this court for the present term, a new trial is granted in this cause."

On January 9, 1900, the following proceedings were had:

"Come the parties by attorneys, and the plaintiff, in order to prevent the granting of a new trial, consents in open court to a remittitur of four thousand two hundred and twenty-five dollars, the sum required by the court, from the amount heretofore on a former day of this term awarded him by a jury upon the hearing of a cause, and for which judgment was rendered; and further consents that a judgment of fifteen hundred dollars may be entered in his favor, instead of and in lieu of the amount so awarded by said verdict and judgment. Thereupon it is considered and adjudged by the court that defendants' motion for a new trial be, and the same is hereby, overruled, and

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that the plaintiff, Geo. C. Lilly, have and recover of the defendants, H. C. Reynolds and W. B. Reynolds, the sum of fifteen hundred dollars ($1,500), besides the costs in this behalf expended; for which let execution issue."

On January 17, 1900, the Honorable John Bruce, district judge of the Northern district of Alabama, allowed this writ of error, and at the same time entered an order extending the time for filing and presenting bill of exceptions to the trial judge 60 days, and thereafter, on March 14, 1900, again enlarged the time in which to present bill of exceptions to the trial judge to the 17th day of April, 1900.

It is within our knowledge, derived from proceedings in this court for a mandamus directed to the Honorable Aleck Boarman, district judge for the Western district of Louisiana, who, under proper authority, held the circuit court of the United States for the Southern division of the Northern district of Alabama, and who was the judge who presided at the trial before the jury in this case, that, although an alleged bill of exceptions was presented to the trial judge for allowance and signature within the time extended by the Honorable John Bruce of the district, yet no bill of exceptions was signed nor perfected. On the record before us the only question that can be considered is whether the complaint, as amended, warranted the judgment finally rendered; and of this, considering the statute of Alabama hereinbefore quoted, there can be no doubt. The record shows no reversible error, and the judgment of the circuit court is affirmed.

(107 Fed. 383.)

SAGE et al. v. FARGO TP.

(Circuit Court of Appeals, Eighth Circuit. March 4, 1901.)

No. 1,426.

1. MUNICIPAL BONDS—POWER OF TOWNSHIP TO ISSUE—KANSAS STATUTE.
   Under Laws Kan. 1886, p. 123, relating to the organization of new counties, which provided that no bonds of any kind should be issued by any county organized thereunder, or by any subdivision thereof, within one year after such organization, and which was amended by Laws 1887, p. 186, so as to read that "no bonds * * * shall be voted for and issued by any county or township within one year after the organization of such new county under the provisions of this act," a township had no power to vote upon the issuance of bonds within a year after the organization of the county, and railroad aid bonds issued pursuant to a vote at an election held within a year after the organization of the county are void, although not issued until after the expiration of such year, and, where the date of the election appears upon their face, all purchasers are chargeable with notice of their invalidity.
2. SAME—VOID BONDS—ACTS OF RATIFICATION.
   Municipal bonds, which were void from the beginning because of want of power in the municipality to issue them, cannot be validated by any subsequent act of ratification or estoppel.

In Error to the Circuit Court of the United States for the District of Kansas.

O. H. Bentley and Rodolph Hatfield, for plaintiffs in error.
S. S. Ashbaugh, for defendant in error.

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Before CALDWELL and SANBORN, Circuit Judges, and ADAMS, District Judge.

ADAMS, District Judge. This was a suit instituted by the plaintiffs in error to recover from the defendant in error upon certain coupons representing accrued interest on certain bonds held by the plaintiffs, and alleged to have been duly issued by Cimarron township, the predecessor in name of the defendant, Fargo township, in Seward county, Kan. The answer disclosed that the bonds from which the coupons were cut were issued in satisfaction of a subscription by the township to the capital stock of the Chicago, Kansas & Nebraska Railway Company, which proposed to build a railroad into and through the township; and that the election required by the railroad aid laws of Kansas (section 1283 et seq., Gen. St. 1889) to determine whether the subscription should be made and the bonds issued to pay the same was held, and the proposition to that effect voted upon, within one year after the temporary organization of Seward county, which occurred July 3, 1886, in violation of the provisions of the act of March 11, 1887 (section 1577, Gen. St. 1889). The answer also disclosed that the bonds issued recited on their face that they were so issued pursuant to the authority of a special election held on March 29, 1887. A demurrer interposed to this answer was overruled by the trial court, and judgment rendered in favor of the defendant.

Counsel for plaintiffs in error contend that this answer states no defense. They concede that the act of March 11, 1887, relating to the organization of new counties, is applicable to the case; but urge that because the bonds were actually executed and delivered to the railway company on April 2, 1888, more than one year after the date of the organization of the county, the mere fact that the election which authorized their issue was held within a year after such organization creates no legal barrier against their right of recovery. They contend that this was, at the worst, a mere irregularity in unessential detail, and that the issue of the bonds, after the year had elapsed, cured the defect or irregularity occurring in the preliminary step.

This argument, in our opinion, is not sound. The railroad aid laws of Kansas, supra, enable any organized municipal township, on compliance with certain prerequisite conditions, to subscribe for capital stock of any railroad company proposing to construct a railway through or into such township, and to issue bonds in payment of such subscription. The act of February 23, 1886 (Laws Kan. 1886, p. 123), relating to the organization of new counties, provided a method for organizing a county, but contained a specific provision as follows: "That no bonds of any kind shall be issued by any county, township, or school district within one year after the organization of such new county, under the provisions of this act." The last-mentioned act was amended by the act of March 11, 1887. Laws Kan. 1887, p. 186. This amended act, after providing a scheme for the organization of the county and the appointment of county commissioners and other officers, as therein stated, enacts as follows:

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"And from and after the qualification of the county officers appointed under this act, the said county shall be deemed to be duly organized: provided, that no bonds, except for the erection and furnishing of school houses shall be voted for and issued by any county, or township, within one year after the organization of such new county under the provisions of this act."

The question presented by the record in this case is whether, under the Laws of Kansas, supra, Seward county, or Cimarron township within that county, was a duly-organized county or township, for the purpose of voting for the issue of bonds in question, when the same was done.

The act of 1886, which contained the proviso preventing the issue of bonds within one year after the organization of the county, in the mind of the legislature of the state required amendment, and the act of 1887 was passed inserting a prohibition, not only against the issue of bonds, but also against their authorization by a vote of the people. The legislature must be presumed to have intended something by this additional prohibition, and the language employed is plain and clear to the effect that bonds could neither be voted for nor issued within a year after the organization of the county. This statute has been construed by the supreme court of Kansas to mean that the organization contemplated by it is only a temporary or provisional one, for special and limited purposes, not including the purpose of authorizing the issue of bonds like those involved in this case. State v. Commissioners of Haskell Co., 40 Kan. 65, 19 Pac. 362. It is there said: "The legislature has, in effect, said that when the temporary officers appointed by the governor under the act relating to the organization of new counties have qualified, the county shall be deemed to be duly organized except for certain purposes, including the voting and issuing of that kind of bonds" which were in that case and are in this case in controversy. The doctrine of that case was approved by this court in the case of Coffin v. Board, 6 C. C. A. 288, 57 Fed. 137. In the last-mentioned case it is held, in substance and effect, that the addition of the words "voted for," found in the proviso of the act of 1887, had the effect of further restricting the power of newly-organized counties, so that they could not only not issue bonds within one year after organization, but could not take the preliminary step of voting for them within that year. Upon the authority of this case, from which we see no reason to depart, it must be held that Seward county, on March 29, 1887, when the vote was taken in Cimarron township to make the subscription and issue the bonds in question, had no such organized existence as enabled it or any of its townships to take the preliminary step of voting for an issue of bonds like those now in controversy. It follows that there was no power in Cimarron township to vote, and thereby contract, for the issue of bonds in question when it undertook to do so, and, in the absence of such fundamental power, the attempt to exercise it is of no avail, and the bonds resulting from such attempt are illegal and void. This conclusion renders it unnecessary to give any consideration to the argument that the township, by the divers subsequent acts of its officers and agents in paying interest for some years on the bonds, is estopped from now asserting their invalidity.

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The bonds, for want of power in the township to contract for them, were wholly void and of no legal effect from the beginning, and the township is not estopped from asserting their invalidity by reason of any of the subsequent acts of its municipal officers or agents or by reason of any supposed ratification by them. Central Transp. Co. v. Pullman's Palace-Car Co., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55, and cases there cited; Marsh v. Fulton Co., 10 Wall. 676, 19 L. Ed. 1040. The bonds contain on their face the recital that they were issued pursuant to the authority of a special election held on March 29, 1887. The act of March 11, 1887, provides that this election could not be held within one year from the date of the organization of the county. Of all this, as well as of the date of organization, the plaintiff was bound to take notice. Coffin v. Board, supra, and cases cited; McClure v. Oxford Tp., 94 U. S. 429, 24 L. Ed. 129. Accordingly, if this were not a case of utter want of power, and were one in which the good faith of the purchasers could be considered, they are clearly shown to have had knowledge of the invalidity of the bonds when they purchased them. The judgment is affirmed.

(107 Fed. 389.)

FIDELITY & CASUALTY CO. OF NEW YORK v. DOROUGH.

(Circuit Court of Appeals, Fifth Circuit. March 19, 1901.)

No. 922.

1. INSURANCE—FAILURE TO PROMPTLY PAY LOSS—CONSTITUTIONAL LAW—DUE PROCESS OF LAW—EQUAL PROTECTION.
   Rev. St. Tex. 1895, art. 3071, imposing on a "life or health insurance company" an additional liability for its failure to pay a loss within the time specified, consisting of 12 per cent. damages on its amount, and attorney's fees for its collection, is not repugnant to the provision of the federal constitution against taking property without due process of law, and guarantying all persons the equal protection of the law.
2. SAME—APPLICATION OF STATUTE TO ACCIDENT COMPANIES.
   Such article has no application to accident insurance companies.
3. SAME—ACTION ON ACCIDENT POLICY—EVIDENCE.
   Where, in an action on an accident policy for injuries resulting in the death of the insured, defendant introduced the deposition of witness to a conversation with deceased, 13 days after the accident, intended to show how it occurred, it was competent for plaintiff to prove by persons present that it was entirely different, and to show what in fact were the statements of deceased in such conversation in relation to the accident, whether they were a part of the res gestæ or not, and no predicate was needed for such evidence after proof of the conversation by defendant.
4. REVIEW—PEREMPTORY INSTRUCTION FOR DEFENDANT—REFUSAL.
   Where there was evidence, though contradicted, strongly tending to support the fact on which plaintiff's case depended, error cannot be predicated on the refusal of a peremptory instruction for defendant.

In Error to the Circuit Court of the United States for the Eastern District of Texas.

This is a suit instituted by Mrs. Mary E. Dorough, for herself and in behalf of the Hartford Fire Insurance Company, C. E. Angel, Trezevant & Cochran, Beers, Kennison & Co., Sun Mutual Fire Insurance Company, Continental

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Fire Insurance Company, Eugene Harbeck, Frank C. Case, Georgis Home Insurance Company, J. T. Harris, and L. L. Jester, against the Fidelity & Casualty Company of New York, upon a certain policy of insurance (called "accident insurance") issued by said insurance company to R. T. Dorough, husband of Mrs. M. E. Dorough, insuring him against bodily injuries sustained through external, violent, and accidental means, and naming the plaintiff, Mrs. M. E. Dorough, as beneficiary therein. The petition alleges that while said policy was in full force and effect the said R. T. Dorough, on the 25th day of June, 1898, while riding as a passenger on a passenger conveyance using steam as a motive power, to wit, on a passenger train of the International & Great Northern Railway Company, was accidentally and fatally injured in falling from said train, and by the fall so received by him his back, spine, shoulders, head, hand, and other portions of his body were injured; that thereafter, on the 15th of July, 1898, he died from said injuries, whereby the defendant became liable and agreed and promised to pay plaintiff the full sum of $10,000. It further alleges, in the event the evidence should show at the trial that the assured did not receive said bodily injuries that resulted in his death, as above shown, while riding as a passenger in or on a public conveyance of the kind and character theretofore alleged, that, notwithstanding, said injuries were in fact received by him, and the injuries so received were the result of external, violent, and accidental means, and that the defendant thereby became liable and agreed and promised to pay the plaintiff the sum of $5,000, as provided by said policy. The several parties for whose use and benefit the suit is brought are shown to have acquired certain interests in said policy of insurance as security for their several debts against the firm of Dorough & Dorough, of which firm R. T. Dorough was a member. The petition contains allegations to the effect that the time stated in said policy for payment had expired prior to the filing of the suit; that payment had been demanded before entering suit to compel payment, and, by reason of the defendant's failure and refusal to pay said policy when demanded, it became liable to pay the sum of 12 per cent. damages on said policy in addition to the amount of the face of the same. It furthermore alleges the employment of attorneys to institute and prosecute the suit, and an agreement to pay for such services the sum of $2,000.—same being a reasonable compensation for such services,—and that by the laws of the state of Texas the defendant company became liable to pay such attorney's fees. A copy of said policy, and application upon which the same was issued, are attached as an exhibit to said petition. The defendant filed special exceptions to the plaintiff's petition upon the ground that none of the exemptions from liability specified in the policy are negatived, and that so much of said petition as seeks to recover $2,000 attorney's fees and the penalty of 12 per cent. on the face of the policy is unauthorized, because there is no valid law authorizing a recovery therefor. And for answer the defendant pleaded a general denial, and the following special defense: "For special answer herein the defendant says that the policy sued on contains, among others not necessary now to be set forth, the following stipulation, to wit: 'This insurance does not cover disappearances; nor war risks; nor voluntary exposure to unnecessary danger; nor injuries received while attempting to board or alight from a moving conveyance propelled by steam, electricity, or cable; nor injuries, fatal or otherwise, resulting from poison, or anything accidentally or otherwise taken, administered, absorbed, or inhaled; nor injuries, fatal or otherwise, received while or in consequence of having been under the influence of or affected by, or resulting directly or indirectly from, intoxicants, anesthetics, narcotics, sunstroke, freezing, vertigo, sleepwalking, fits, hernia, nor any diseases or bodily infirmity.' And the defendant avers that the injuries received by the assured, R. T. Dorough, were received while he was attempting to alight from one of the trains of the International & Great Northern Railway Company while same was moving and being propelled by steam, and that therefore the defendant is not liable." The case was tried, and resulted in a verdict for the plaintiff, for the use and benefit of the several parties named in the petition, in the total sum of $3,513.09, and for herself in the sum of $7,126.91, and also for the further sum of $1,200 as damages, and $1,500 as reasonable attorney's fees, making a total of $14,340.

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The defendant sued out this writ. The propositions presented in this court are the following: "First. That there is no law authorizing the damages and attorney's fees claimed by defendant in error. Second. That the statutes of Texas under which 12 per cent. damages and attorney's fees are claimed by defendant in error are repugnant to those provisions of the constitution of the United States which provide that no man's property shall be taken without due process of law, and that all persons shall be accorded the equal protection of the law. Third. That the court erred in allowing Mrs. M. E. Dorough to testify in rebuttal, and for the purpose of impeaching witness W. Hugh Hunter, as to what statements the assured made as to how the injury occurred, some thirteen days afterwards, as the testimony attempted, without laying any predicate, to impeach Hunter, and was not admissible as part of the res gestæ. Fourth. That the court erred in not granting the motion of plaintiff in error to charge the jury peremptorily to return a verdict for the defendant; the defendant having proven that the injuries from which assured died were received while alighting from a moving train in violation of the provisions of the policy sued upon, and no evidence in rebuttal having been offered by the plaintiff."

P. B. Trafford, W. Frank Knox, F. M. Etheridge, and Ben. B. Cain, for plaintiff in error.

H. B. Marsh, A. G. McIlwaine, and J. M. Fitzgerald, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts as above). It is conceded there is no law in the state of Texas authorizing the damages and attorney's fees awarded in the verdict and judgment in this case, unless it be found in article 3071, Rev. St. Tex., adopted in 1895, as follows:

"Art. 3071. In all cases where a loss occurs and the life or health insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of the loss, 12 per cent. damages on the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of such loss."

This section was a part of an act originally passed on May 2, 1874, prior to which time there were no statutes in the state of Texas regulating insurance companies. Other sections of the act of 1874, and afterwards incorporated in the Revised Statutes, are as follows:

"Art. 3073. It shall be unlawful for any life or health insurance company to take any kind of risks or issue any policies of insurance except those of life or health, nor shall the business of life or health insurance companies in this state be in any wise conducted or transacted by any company which in this, or any other state or country, is engaged or concerned in the business of marine, fire, inland or other insurance."

"Art. 3061. It shall not be lawful for any person to act within this state as agent or otherwise in soliciting or receiving applications for insurance of any kind whatever or in any manner to aid in the transaction of the business of any insurance company incorporated in this state or out of it, without first procuring a certificate of authority from the commissioner of agriculture, insurance statistics and history."

In February, 1875, another act was passed regulating the business of fire, marine, and inland insurance companies. See Rev. St. Tex. arts. 3074, 3085. And in April, 1895, an act was passed which, among other things, defined and distinguished life and accident insurance companies as follows:

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"Art. 3096a. A life insurance company shall be deemed to be a corporation doing business under any charter involving the payment of money or other thing of value to families or representatives of policy-holders, conditioned upon the continuance or cessation of human life, or involving an insurance guarantee, contract or pledge, for the payment of endowments or annuities. An accident insurance company shall be deemed to be a corporation doing business under any charter involving the payment of money or other thing of value to families or representatives of policy-holders, conditioned upon the injury, displacement or death of persons resulting from traveling or general accident by land or water."

Chapter 55 of the Laws of 1895 provides as follows:

"That there is hereby imposed upon and shall be collected from each and every person or firm acting as general agents of life, fire, marine and accident insurance companies who may transact any business as such in this state, an annual occupation tax of fifty dollars."

In Association v. Yoakum, 39 C. C. A. 56, 98 Fed. 251, followed in Insurance Co. v. Ross, 42 C. C. A. 601, 102 Fed. 722, this court held that article 3071, above quoted, being in force at the time the contract of life insurance was made, became as much a part and parcel of the contract as if it had been expressly incorporated in the policy, and that as against life insurance companies doing business in the state of Texas after article 3071 became a law, and issuing policies thereunder, said article was not in violation of the constitution of the United States. The question presented here, however, is not necessarily one of constitutionality of the said article in respect to the constitution of the United States, but, rather, of its applicability to accident insurance companies, as distinguished from life and health insurance companies. The contention was made below, and evidently allowed by the circuit court, and is renewed here, that an accident insurance company is a life or health insurance company, and therefore the statute applies. We have quoted the sections of the statute of Texas bearing upon insurance companies, and we think it plainly appears therefrom that accident insurance, in the legislative mind, was distinct from life and health insurance. The definitions of a life insurance company and of an accident insurance company, as given in the statutes above quoted, show this distinction. One is conditioned upon the continuance or cessation of human life; the other is conditioned upon injuries resulting from traveling, or general accident by land or water. Outside of the defining statute quoted, it is common knowledge that the one insures against the inevitable, with the intent that eventually the amount of the policy shall be paid to the beneficiary; the other insures against the accidental, with the intent that the liability of the insurance company to pay the amount or amounts stipulated shall attach only on the occurrence of bodily injuries to the insured, sustained through external, violent, and accidental causes. The distinction between accident insurance and health insurance is equally clear. Accidental injury may happen; sickness and infirm health may be considered as inevitable. In the one the amount of indemnity stipulated may never become due; in the other, if the policy is kept in force the indemnity stipulated is certain to become due. There is little doubt that the statute in question, imposing penalties upon life and health insurance companies which are

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so combative as to contend for their supposed rights under written contracts containing resolutory and suspensive conditions, and based on warranties, in the courts of the state of Texas, when the right to so contest is denied no other class of suitors, is penal in its character; and, we take it, there is no doubt of the proposition that statutes penal in their nature are to be construed strictly, and not extended by implication, intendments, analogies, or equitable considerations. Black, Interp. Law, 286; Potter, Dwar. St. 245 et seq.; Suth. St. Const. §§ 358, 366; Railway Co. v. Dwyer, 84 Tex. 194, 19 S. W. 470; Schloss v. Railway Co., 85 Tex. 601, 22 S. W. 1014; U. S. v. Harris, 177 U. S. 305, 20 Sup. Ct. 609, 44 L. Ed. 780. If the statute in question is regarded as not penal, but only remedial, still it ought not to be construed to include more than its plain language imports. See Turner v. Cross, 83 Tex. 218, 18 S. W. 578, 15 L. R. A. 262. It follows that, in our judgment, there is no law of the state of Texas authorizing the damages and attorney's fees allowed in this case. What we have said disposes of the first contention of the defendant in error, and this disposition renders it unnecessary to pass upon the second any further than we have done above.

The record shows the following proceedings in the court below:

"The defendant, after having established the fact that Mrs. M. E. Dorough, the plaintiff, was present when a conversation occurred between R. T. Dorough, the assured, Hugh Hunter, and others, some thirteen days after the injury occurred from which he finally died, introduced the depositions of said Hunter in evidence, and included in said depositions are the following interrogatories and answers, to wit: 'Did you see and talk with the said R. T. Dorough after he was injured on June 25, 1898? If yes, how came you to see him? When and where and under what circumstances did you see him; and who, if any one, besides yourself was present at the time?' To which the witness answered as follows: 'I saw him and heard him talk some. I went to see him at his residence in Tyler. When I heard him talk, there were present Mrs. R. T. Dorough, Capt. R. S. Price, Paul Florian, Chas. Gilmour, and myself, as well as I remember. Those were all that were in the room at the time.' 'Int. 4. If you have stated that you saw the said R. T. Dorough subsequent to the time he was injured, then state whether or not he made any statements to you as to how he came to be injured. If you say he did, then state fully, particularly and in detail, as nearly as you can in his exact language, what he said with reference thereto. State who, if any one besides yourself were present and heard the statements so made.' To which the witness answered as follows: 'All the parties that I have mentioned above were in the room when I heard Mr. Dorough talk on the occasion named. Mr. Dorough's talk was directed more to Mr. Florian and Capt. Price, because they were standing nearer the bed on which Mr. Dorough lay. Mr. Gilmour and myself stood a little away from the bed, but near enough to hear distinctly. Mrs. Dorough was also in the room. Mr. Dorough said that when the accident occurred which caused his injury he was coming into Tyler on the I. N. G. N. R. R., on the branch that runs from Troupe to Mineola; that the train pulled up and stopped at the water tank a short distance before reaching the station; that he there got out on the steps of the car on which he was riding, and when the train moved up and was crossing a street or road near the water tank he jumped off of the train as it was crossing this street, or near there, as this point was considerably nearer his residence than the station was; that when he jumped off the moving train he in some way fell or slipped, and his hand got under a wheel of the moving train, and before he could remove it the flange of the wheel ran over his hand lengthwise and crushed it; that this happened during the night.' After the defendant's evidence was closed, the plaintiff, Mrs. M. E. Dorough, was recalled to the stand to contradict said Hunter as to the conversation which occurred, and to

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which said Hunter testified in his depositions; and said witness, having testified that she heard the conversation, was asked by her counsel the question whether or not said R. T. Dorough made the statements testified to by said Hunter in her answer to the fourth direct interrogatory, to which she replied, in substance: 'No; there was no such statements made by Mr. Dorough as testified to by Mr. Hunter.' The counsel for plaintiff then asked her to state what she heard Mr. Dorough say as to the cause of the accident in the presence of said Hunter; and witness stated that Mr. Dorough said that as he was alighting from the train he slipped on something and fell, injuring his back and arm, and that the train was standing still when he fell. Defendant objected to the question propounded to Mrs. Dorough as to what Mr. Dorough stated in conversation with Hunter, because: First. No predicate had been laid to impeach said Hunter in the cross interrogatories, which cross interrogatories are as follows, to wit: 'Cross Interrogatory 1. How many times did you see Mr. Dorough after he was injured, and prior to his death? When and where did you see him and converse with him? Name all the parties who were present at each and all the conversations you had with him? Cross Interrogatory 2. If in answer to direct interrogatory five you attempt to repeat a statement made by Mr. Dorough as to the cause of his injuries, then say when this statement was made to you; that is to say, give the date of the conversation, as well as the hour of the [day]. Is it not true that the only conversation you ever had with Mr. Dorough after he was injured was at his residence, in the forenoon of Wednesday, the 7th day of July, 1898? Did Mr. Dorough at any time while you were in his presence complain of pain? Of which of his injuries did he most complain?' And said two cross interrogatories are the only interrogatories propounded to said Hunter by the plaintiff. Second. Because the question asked Mrs. Dorough called for a statement made by R. T. Dorough, the deceased, which was not a part of the res gestæ, in that same was made more than twelve days after the accident, and which was not admissible for the purpose of impeaching said Hunter. The court, over the aforesaid objection of defendant, admitted said evidence, but instructed the jury when said evidence was admitted, and afterwards in his charge, that they would only consider the same for the purpose of determining whether or not Hunter's testimony as to what Dorough said was true, and for no other purpose, to which ruling of the court the defendant, in open court, excepted."

We are unable to discover any injury in the above rulings—assuming them to be erroneous—to the defendant below. The defendant having offered the deposition of Hunter to prove a conversation with R. T. Dorough, the assured, had in the presence of several other persons besides the witness, it was perfectly competent for the plaintiff to prove that no such conversation took place, or that, if the conversation did take place, it was not such a conversation as was testified to by the witness Hunter, but varied therefrom or was otherwise explainable. If the conversation of Dorough 13 days after the accident occurred was admissible as affecting the issues in the case, the plaintiff had as much right to prove what it was as the defendant below had. Carver v. U. S., 164 U. S. 694, 17 Sup. Ct. 228, 41 L. Ed. 602. And after it was proved on the other side no predicate was necessary. As we look at the bill of exceptions, no error prejudicial to the defendant below was committed in the rulings restricting the contradictory evidence offered by the plaintiff. If error at all, it was an error in favor of the defendant below, for which it cannot complain in this court.

The transcript shows that on the trial there was evidence strongly tending to show that the injuries from which the assured, Dorough, died were received while alighting from a moving train; but there was also evidence tending to show that Dorough received his injuries

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while traveling upon a railroad train, and when attempting to alight therefrom while the said train was at a standstill. As the evidence was in this condition, it was not error for the trial judge to refuse to peremptorily instruct the jury to find a verdict for the defendant.

This disposes of all the contentions presented in this court, and, although we find for the plaintiff in error on the proposition as to attorney's fees and damages, we think justice can be done between the parties by modifying the judgment rendered in the court below, and without reversing it and awarding a new trial. It is therefore ordered and adjudged that the judgment of the circuit court be amended and modified by reducing the amount adjudged in favor of Mrs. M. E. Dorough and against the Fidelity & Casualty Company of New York from the sum of $9,827.91 to $7,126.91, and as thus modified the judgment is affirmed, with costs; the costs of this court, including the transcript, to be paid by the defendant in error.

(107 Fed. 395.)

ST. LOUIS BREWING ASS'N v. HAYES et al.

(Circuit Court of Appeals, Fifth Circuit. March 19, 1901.)

No. 935.

1. REVIEW—INSTRUCTIONS—REFUSAL.
   Where special instructions were offered, refused, and the refusal excepted to en bloc, no error can be predicated thereon if some of them were unquestionably bad.
2. SALES AGENT—SURETIES—DISCHARGE FROM LIABILITY.
   Under a sales agent's contract he was to pay cash on receipt of a bill of lading, and to keep strict account of all goods received by and returned by him, and his sureties bound themselves to pay or cause to be paid to his principal all sums which should become due on account of shipments to him or on his order during one year, during which all payments by him were to be made promptly in the ordinary course of business. *Held*, that failure of the agent to pay cash for any shipment on the receipt of the bill of lading was a breach of contract entitling his principal to proceed against him and his sureties to enforce collection of the debt then due, and hence his sureties were entitled to call on authorized agents of his principal for information as to the state of his accounts, and if, by their misrepresentations, the sureties changed their position to their detriment, they were discharged from liability.

In Error to the Circuit Court of the United States for the Eastern District of Mississippi.

This is a suit brought to recover from the principal and sureties on a certain bond, which is in the words and figures following, to wit:

"The State of Texas, County of Galveston. Know all men by these presents, that we, the undersigned, George Hayes, as principal, and other subscribers hereto, Nicholaus Bohn and H. C. Kerst and George Schwoebel, as sureties, acknowledge ourselves bound to pay unto the St. Louis Brewing Association. Klaussman Brewery Branch, the sum of twenty-five hundred dollars ($2,500.00). The condition of this obligation is such that whereas, the said George Hayes has been appointed agent of said St. Louis Brewing Association, Klaussman Brewery Branch, in and for the city of Galveston, Texas, and the said St. Louis Brewing Association, Klaussman Brewery Branch, has agreed to ship beer to said Hayes, from time to time, for the

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period of one year, beginning on November 18th, 1893, and ending on November 18th, 1894: Now, if the said Hayes shall pay, or cause to be paid, to the said St. Louis Brewing Association, Klaussman Brewery Branch, or to its agents or officers, any and all sums of money that may be or become due to said St. Louis Brewing Association, Klaussman Brewery Branch, by said Hayes on account of such shipments of beer made to him or to his order during said time,—that is to say, from November 18th, 1893, to November 18th, 1894,—all of said payments by said Hayes to be made promptly in the ordinary course of business and within said dates last mentioned, then this obligation to be and become null and void; otherwise, to remain in full force and effect.

"Witness our hands at Galveston, Texas, this 20th day of November, 1893.

"[Signed] N. Bohn.
"Geo. Schwoebel.
"H. C. Kerst."

The appointment of Hayes as agent, referred to in the bond, contained, among others, a provision that the said Hayes was to pay cash on receipt of bill of lading for all beer delivered.

The record shows the following plea setting up the issue as to the release of the sureties: "And these defendants further say that the said Hayes failed in business and became insolvent on or about July, 1894; that prior thereto, in April, May, or June, 1894, these defendants, mindful of the fact that they were sureties on his bond, determined to make some inquiry into the manner in which he had been conducting business with plaintiff and of the state of the account existing between him and the plaintiff, and with such end in view, did institute an inquiry to the plaintiff, or its duly-authorized agents, to wit, one Waterman, who was then and there the agent of plaintiff, and one H. J. Panzer, who was then and there the auditor of plaintiff, and these defendants were informed by said agents of plaintiff, upon the inquiry aforesaid, that the said Hayes was in all things keeping and complying with and fulfilling the terms of his contract with the plaintiff; that thereupon these defendants, relying entirely upon the statement so made to them by plaintiff's said agents, exercised no further diligence in looking after the affairs of said Hayes and plaintiff, arising from said contract, and believed that said Hayes was in no wise indebted to the plaintiff, and rested under said belief until long after said Hayes had failed in business and became insolvent, until on, to wit, the 4th day of October, 1894, when the suit was filed against them; that plaintiff had never made any demand upon these defendants for the payment to them of the obligations of said bond, and had never in any wise notified these defendants that said Hayes was indebted to them upon said contract, or that any obligations of any kind existed upon said bond, and defendants were in entire ignorance thereof until the filing of this suit; that had it not been for the false and deceitful statements made to these defendants by plaintiff, through its agents, as aforesaid, that these defendants could and would at that time have protected themselves to the extent of said bond; that said Hayes at that time was well worth the amount of said bond, and was then a man of some credit and resources, and could have and would have protected these defendants; that by reason of the false and fraudulent statements aforesaid, and the willful misleading of these defendants by plaintiff, through its said agents, and the failure to notify these defendants of any liability under said bond prior to suit and within a reasonable time after the default of the said Hayes, which these defendants say it was the duty of the plaintiff so to do upon the first default of said Hayes,—that is to say, upon his failure to pay for the first shipment of goods upon receipt thereof of the bill of lading,—they are discharged from all liability on said bond, and the plaintiff is and ought to be estopped from prosecuting any other and further action against them thereunder."

The bill of exceptions shows, with other evidences bearing on the same issue, the following:

"Nicholaus Bohn, one of the defendants, being duly sworn, testified in his own behalf as follows: 'I am Nicholaus Bohn, one of the defendants in this case. I signed the bond for George Hayes as a surety on the 20th of November, '93. I know a gentleman by the name of Waterman. He was a travel-

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ing salesman, collected for the Klaussman Brewery Branch, traveling salesman, and attended to the beer business of the Klaussman Branch, and collected for the Klaussman Branch,—the Klaussman Brewery Branch of the St. Louis Brewing Association. I met Mr. Waterman in the year 1894. I made it my business to hunt him up. I went out to the beach to see Mr. Waterman in Galveston, Texas. I believe it was about April, 1894. I saw him (Mr. Waterman) at a couple of places. The first time I made it my special business to hunt him up. Then I met him in the city and asked him about it. I made it my special business to see Mr. Waterman to find out how George Hayes stood up to his contract,—how he was paying up. (Plaintiff objects to any testimony from Mr. Bohn as to any conversation which he had with Mr. Waterman or any other agent of the plaintiff in April, '94, or at any other time prior to the maturity of this contract, for this reason: the contract which Mr. Bohn, Mr. Schwoebel, and Mr. Kerst have signed expressly provides that they hold themselves liable to the plaintiff to the extent of $2,500 for any and all indebtedness which may accrue to the plaintiff, to the extent of $2,500, between the 18th day of November, 1893, and the 18th day of November, 1894, and therefore what any agent of the plaintiff may have said to Mr. Bohn as to the condition of accounts between Hayes and the plaintiff, or as to what may have transpired between the plaintiff itself and any of these parties that signed the bond, is wholly immaterial, because their liability was not fixed until the termination of this contract, when it was then to be ascertained and determined. Plaintiff makes this general objection so as not to interrupt counsel in his examination of witness, so that plaintiff can have its bill of exceptions.) Mr. Waterman was the traveling agent of the Klaussman Branch of the St. Louis Brewing Association. He attended to the sales, collected money, and attended to their business. He was sent out here. He went around collecting money for the different agencies, and settled up the accounts of the brewery with the agents, and also sold beer,—generally looked after the business. Looked after the business of the Klaussman Branch of the St. Louis Brewing Association as traveling salesman of the St. Louis Brewing Association, Klaussman Brewery Branch. Q. Now, I will ask you the same question that the gentleman objected to. You called on him, then, to find out how Hayes was paying up the company? A. Yes, sir. I called to see Mr. Waterman, and asked him how Mr. Hayes was paying the company,—how he was paying up. He told me he was one of the best agents.— The Court: I will admit the evidence, subject to hearing whatever authorities may be used in the argument,—according to what opinion I may have then about it. The Witness: He said George Hayes was one of the best agents they had. He was prompt, and he was only behind about $100, and "you are all right." I said, "I wish you would notify me to that effect if anything goes wrong, or any other way." That was in April, 1894. Mr. H. J. Panzer was auditor for that company St. Louis Brewing Association, Klaussman Branch. Q. What did he do? A. I saw him go into the office of George Hayes and look over the books. I have been in the office. His business was to go over the accounts and look at the books of agents, and settle up the accounts. I thought that was the proper party to find the particulars from. He looked over the books. I had a conversation with Mr. Panzer. He told me the same thing that Waterman did. I first saw Mr. Panzer in the beginning of June, 1894, on Twentieth and Mechanic streets in the city of Galveston. Mr. Panzer said Hayes was all right. All he was behind was $100 or $125. Waterman said only about $100, but he went up to $125. That was in June, '94, Mr. Panzer told me that Hayes was all right; if he was behind at all, it did not exceed $100 or $125. Q. Now, Mr. Bohn, if Mr. Waterman and Mr. Panzer had told you at that time that George Hayes was $3,000 or more in debt, what action would you have taken? (Counsel for plaintiff objects to this on the ground it asks for his conclusions,—what he would have done under certain state of facts. If the evidence is admissible at all, counsel for plaintiff thinks the only proper evidence that the defendants may introduce in that connection would be that he could follow up what Mr. Bohn has stated already with reference to the condition of Mr. Hayes at that time, and let the jury draw their conclusions, and not let Mr. Bohn supply those conclusions for the jury. The ordinary practice would be to let the jury conclude from the evidence what would or could have

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been done, and not the witness himself. The court overruled objection. To this ruling of the court, plaintiff excepts.) A. I would have demanded in writing of the Klaussman Branch that they institute suit against George Hayes at once for their money, to make him live up to the contract. George Hayes was solvent in April and June, 1894. Q. Do you know what property he had? A. He had a good deal of beer on hand, had ice boxes on hand, two wagons and outstandings, and I believe he had a bank account also. He was conducting and running a beer business here. He paid his bills promptly. I did blacksmith work for him, and he paid his bills promptly. I considered Hayes' accounts, everything together, it would amount to from seven to ten thousand dollars. Q. Do you know when Hayes retired from business? A. I believe it was in August. I cannot say for sure, because we got notice to that effect. We never knew anything about it that Hayes was behind. It was in August, I believe, that we heard he was behind. That was the first time I ever got notice. He had quit business then. Q. What became of his business and his property? A. The brewing company took some away from here, and some, of course, he sold. What he did with it I do not know. Q. You know he got rid of it? A. Yes, sir. I do not know what became of George Hayes. He stayed here a couple of months, and then I do not know where he went. Q. He left here? A. Yes, sir.'

"Cross-examination by Mr. Davidson: 'Mr. Panzer was the auditor of the St. Louis Brewing Association. In the first place, Geo. Hayes told me the auditor was down here. I went down to the office. I saw he had the accounts, the books; looked over the books and everything; straightened out things. I could not make anything else out of it. He answered it himself. He also told me Waterman was salesman for the St. Louis Brewing Association. I saw Waterman years before. Before Hayes had the business, he always came down and looked after the business,—looked after the customers, collected money, sold beer, hunted up new customers; did that before Hayes had charge of the business. That was his business at the time I had the conversation with him, as far as I know. When these gentlemen were here in 1894, I believe in April and June, 1894, I made it my special business to go find them and see them. I did that because I was on this bond. I wanted to see how Hayes stood. I expected them to tell me the truth, too. I went to them for that purpose to ascertain the state of the account. That was because I was on this bond, and because they were shipping beer to Mr. Hayes under this contract. My present business is blacksmith and horseshoer in Galveston, since 1870. I was in that business in 1893 and 1894. I was never engaged in the beer business. Mr. Panzer told me that there was about $100, perhaps $125, due by Hayes. He said $100 to $125 was all that Hayes owed his people in June, 1894. Mr. Panzer, he worked on the books. When I went in the office, he was there. He was examining the books. Panzer was auditor. I went there to find out how George Hayes stood. I took his statement. I expected him to tell me the truth. Hayes was not there. I asked Hayes about the account once in a while. He said everything was all right. I never asked Hayes particularly how he stood. I would not rely on his statement. I thought the proper party to rely on was the St. Louis people. I relied on the St. Louis people. I asked Hayes once or twice. He only complained about the boycott. He told me the business was going along first rate. He said the company would look out for him. I know Hayes had a bank account. He gave me checks on the bank sometimes, when he paid my blacksmith bills. I got my money for it. That is the only information I have about a bank account. Q. You testified as to his having some seven or ten thousand dollars in property. Tell the jury what that property was in, please. A. I went to the cold storage sometimes. I suppose he had one, two, or three carloads of beer there. Q. When were you in the cold storage? A. Off and on. Q. What month? A. I was in there May, June, off and on; maybe in April, also. I often had to go in there. In the first place, to see how everything stood. I was on his bond. Q. Did you take stock? A. I did not take stock. I went in there as I would in any other house. I went in the place, and looked around, and used my judgment. I looked and saw if there was beer there that belonged to George Hayes. I went in the cold storage sometimes twice a month, sometimes once a month, —any time I had business down there; in April, May, and June, 1894, and

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also before that. Q. Was anybody else's beer in there? A. Yes, sir; some other beer there, too; always had three carloads in there. I saw some bottled beer there. I didn't count them. I also saw some beer standing on side track unloading. I went in there to see how everything looked, or if he was well protected, and me, also. I saw he was worth $10,000. Q. How much beer did you say was there? A. I always considered two or three carloads. I also saw a lot of bottled beer there in barrels. I supposed he had paid for it. That is what Panzer and Waterman told me, because they said all beer must be paid cash for on receipt of bill of lading. Q. What is that worth a car? A. I really do not know, except from hearsay. I stated Hayes was worth seven to ten thousand dollars. I suppose a carload of beer was worth about $400. Q. That is $1,200. A. I also saw it on the track. Q. Tell us about it being on the track. A. I saw sometimes two, three, and four carloads standing on the track and unloading. Hayes had a whole lot of customers he furnished ice boxes to. I do not know what they were worth to the business. I never counted them. I did not go that far. I know Hayes had a whole lot of beer faucets. I saw them in the cold storage. Some I saw in his office when I went in there. I patronized my friend Hayes always. I saw those beer bottles, too. The beer boxes George Hayes told me belonged to him. Hayes had two wagons, I know of. I did his blacksmithing. He had one general beer wagon that belonged to him individually. The wagons and mules were worth about $275, I suppose. He had a buggy. It was brand-new. I sold it to him myself. I sold it to him for what it was worth, $150, four or five months, maybe three months, before he quit business. I could not really say what other property Hayes had. All the rest is hearsay. He was interested in some store. My information was he (Hayes) didn't owe anything. I inquired all I could in my estimation. If they told me lies, I could not help it; it was not my fault. I do not know whether or not Hayes owned a foot of ground.'

"Redirect Examination: 'Q. If Hayes owed $3,000 in April, could you have made the money out of him? A. He had plenty of property at that time, and in June, 1894, he conducted this beer business, it was a going concern, and the money could have been made out of him at those times.' "

On the issue in question, the judge charged the jury as follows: "The defendants claim to have had a conversation with one Panzer in June, 1894, in regard to the state of this account, and they have introduced the evidence of Mr. Panzer, at that time, that he was in the employ of the plaintiff, and was here for the purpose of adjusting this account,—looking after the solvency of the sureties. They have read you his evidence about what the conversation was with Nicholaus Bohn. You have heard the evidence of the other parties. Now, if you believe from the evidence that Mr. Panzer at that time was representing the plaintiff, and had the authority to adjust this particular account now in suit, the statements he may have made—if he did make any to these sureties—would come within the scope of his authority as acting for the plaintiff, and would be binding upon the plaintiff, the same as being made by the plaintiff in person, if such a thing was possible. Therefore, you are to determine whether or not he made the statement that the account was practically even, or he may have owed $100 or $125. If you find he made that statement, and it is materially false in this, that at that time Hayes was in arrears as much or more than the bond (I believe the account shows about $3,000), if you find that to be true, then you are instructed in this manner: That statement, although false, and found to be false, would not release the sureties, unless you find from the evidence that at that time Hayes was solvent, or at least he was solvent to the extent that the sureties could have protected themselves as against liability upon this bond. If you find he was solvent to the extent they could have protected themselves to the full extent of the bond, in that event it would be a defense in this action, and you would find as against Hayes and in favor of the sureties. If, however, you believe, from the evidence, that the statement was made, and it was misleading and untrue in fact, yet if you believe from the evidence Hayes was then insolvent, and these parties could not have collected this bond then, although the statement might have been false, or was false in fact, that would not relieve the defendants. They could only be relieved in the event you find the statement to be false, and Hayes was solvent, and they could

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have protected themselves or could have partially protected themselves. If you find he was entirely solvent, and they could have been protected for the $2,500, then you will find for the sureties. If you find, however, he was not wholly solvent, but they could recoup for $500 or $1,000, or any such sum, it would be a partial reduction, a partial defense, but not a complete defense. Upon that issue, gentlemen, the burden of proof is upon the sureties to show by a preponderance of evidence that the statements were made by Panzer, that it was in the scope of his authority, that it was untrue in fact and they were misled to their injury; and the further fact, Hayes at that time was solvent, that they could have protected themselves to the extent of the bond, or even, if not wholly solvent, they could have protected themselves partially, it is only a partial defense,—it would be only a reduction of their liability. The limit of their liability is $2,500, with interest at six per cent. from the 1st January, 1895. Therefore, if you find Hayes was insolvent, although you believe the statement to be untrue in fact, therefore you will find a verdict in favor of the plaintiff against George Hayes for $5,167.46 with six per cent. interest from the 1st January, 1895, and find against the sureties, N. Bohn, Schwoebel, and Kerst, in the sum of $2,500, with six per cent. interest from the 1st January, 1895. If you find Hayes was solvent, and they could have made the entire bond or saved themselves entirely upon the bond, the latter part of your verdict shall be: 'We, the jury, find in favor of the sureties, N. Bohn, Schwoebel, and Kerst [giving their names], as against the plaintiff;' or, if you find that they could have recouped themselves, or saved themselves, to a certain extent, you will find the verdict in favor of the sureties for the difference between $2,500 and what they could have saved themselves, with interest from the 1st January, 1895. You are the judges of the weight of the evidence and the credibility of the witnesses. It becomes purely a question of fact for your determination."

The verdict of the jury was against the principal, Hayes, for the full amount claimed, but in favor of the sureties on the bond, releasing them from all liability.

Geo. E. Mann, for plaintiff in error.

John Lovejoy, A. Sampson, and M. L. Malevinski, for defendants in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

After stating the case as above, PARDEE, Circuit Judge, delivered the opinion of the court.

This is the third appearance of this case in this court. On the first writ of error the question presented was whether an arrangement between the brewing association and the principal on the bond by which the brewing association was to furnish beer on credit, operated to release the sureties from liability on the bond, and this court held that such outside arrangement did not operate an entire release of the sureties. See Association v. Hayes, 17 C. C. A. 634, 71 Fed. 110. On the second writ of error, the questions passed upon were whether the failure of the principal, Hayes, to sign the bond under the circumstances shown in the evidence, operated to relieve the sureties from liability thereon, and whether the delivery of the bond sued on, which was denied by the pleadings, was necessary to be proved by direct evidence. See Association v. Hayes, 38 C. C. A. 449, 97 Fed. 859. On the third trial the defense relied upon was that the sureties were released because, while the contract required that Hayes, the principal, should pay for the beer upon receipt of the bills of lading, the brewing association had given him large and extensive credit, and upon the application of the sureties to the brewing association and its

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agents for the information as to Hayes' accounts the sureties had been misled and deceived by representations that said Hayes was in all things keeping and complying with and fulfilling the terms of his contract, when in fact he was then indebted for more than the amount of the bond, whereby the sureties were lulled into security and lost all opportunity to protect themselves, the said Hayes being at the time possessed of sufficient means and property to have fully paid off his liabilities. On this last presentation, counsel for plaintiff in error presents some twelve assignments of error, the first four of which are altogether too general to demand attention, and the last seven are based upon the refusal of the court below to give some eight special instructions, offered, refused, and excepted to en bloc, some of which are unquestionably bad, and therefore the whole offering was properly refused. Without further criticism of the assignments of error, we notice that while they challenge the rulings of the court on admissions of evidence, object to the general charge of the court, and challenge the rulings refusing the special charges asked, they practically present one question only,—that is, whether the sureties were released from their obligations on the bond by reason of misrepresentations made by the agents of the association to the sureties in regard to the state of the accounts between Hayes, the principal on the bond, and the association. The major proposition submitted by counsel for plaintiff in error, on which the whole case hangs, is as follows:

"The liability of the sureties did not and could not accrue until the year ended on October 18, 1894, or Hayes finally stopped buying beer under the contract for year ending November 18, 1894, and it was irrelevant and misleading to the jury to allow evidence as to what the traveling auditor said Hayes owed in April or June, or evidence as to what property Hayes owned in April or June, 1894."

On the last hearing in this court it was held that the contract of appointment of Hayes and the bond given in pursuance thereof were parts of the same transaction, and must be construed together as one instrument. See Association v. Hayes, 38 C. C. A. 449, 97 Fed. 859. This being the case, if we turn to the contract of appointment, we find that Hayes was to pay cash on receipt of bill of lading, and to keep strict account of all packages, kegs, or half barrels received, as well as empties returned; and by reference to the bond we see that the sureties bond themselves that Hayes should pay or cause to be paid to the association any and all sums of money that may be or become due to said association by said Hayes on account of shipments of beer made to him or his order from November 18, 1893, to November 18, 1894, all such payments to be made promptly in the ordinary course of business. Under this contract the failure on the part of Hayes to pay cash for each shipment upon receipt of the bill of lading was a breach of the contract, and gave the association the right to immediately proceed by suit against Hayes and his sureties to enforce the collection of its debt then due; and it seems to be idle to contend that under the contract between the parties Hayes could buy beer for a whole year, neglect to pay, embezzle, or otherwise waste the proceeds,

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and, during the whole year, the association and the sureties should stand idly by, unable to protect themselves. The association had the right to demand payment for each consignment as soon as it was received by Hayes, and, in case, with the consent and nonaction of the association, Hayes was neglecting to pay, and yet receiving large consignments of goods, the sureties would have a right to protect themselves; and, if the sureties had a right to protect themselves whenever Hayes' conduct became such as to imperil their interests, then we think it is clear that if, by misrepresentations on the part of the association, the sureties were lulled into security, and thereby their condition made worse than it would have been if they had been truthfully informed as to the facts, they would thereby be discharged.

As to the matter of the state of Hayes' account, the inquiries made by the sureties, the representations made by the association and its agents, the authority of the agents to speak for the association, and whether or not the sureties' condition was worse in June than in October, when suit was finally instituted, are questions all raised by the pleadings, and, under evidence tending to establish the same, were, in a fair, lucid charge by the court, submitted to the jury. It may be that, if the case were now before us upon the same facts, we would find a different verdict, but as the record stands we find no reversible error in the proceedings of the circuit court, and its judgment is affirmed.

(107 Fed. 402.)

FIDELITY MUT. LIFE ASS'N v. JEFFORDS.

(Circuit Court of Appeals, Fifth Circuit. March 19, 1901.)

No. 944.

1. LIFE INSURANCE—CONTRACT—LEX LOCI.
   A contract of life insurance, made and delivered and the premiums paid in the state where insured resided, is a contract of that state and governed by its laws.

2. SAME—APPLICATION—ANSWERS—WARRANTIES OR REPRESENTATIONS.
   Answers to questions propounded in an application for life insurance, unless clearly shown by the form of the contract to have been intended by both parties to be warranties, to be strictly and literally complied with, are to be construed as representations.

3. SAME—MISSTATEMENTS AND CONCEALMENTS—EFFECT OF GOOD FAITH.
   Code Ga. 1895, § 2097, requires applications for life insurance to be made in the utmost good faith, and declares that representations are considered as covenanted to be true, and that a variation by which the nature, extent, or character of the risk is changed will void the policy. Section 2099 declares that failure to state a material fact, if not done fraudulently, does not avoid the policy, but the willful concealment thereof, enhancing the risk, will avoid it. Section 2101 avoids a policy for willful misrepresentation as to any material inquiry made. *Held*, in view of this statute, that an untrue statement by insured that he did not have consumption, or his omission to name, when requested, all physicians who examined him within a specified time, would not avoid his policy, if his answers were made in good faith, and the misstatement or omission was not willful, but due solely to his ignorance or failure to recollect, notwithstanding he distinctly certified that his answers were true,

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and agreed that, if any concealment or untrue statement or answer be made, the policy should be void.

4. SAME—ISSUANCE FOR BENEFIT OF BROTHER.
A life insurance policy may be taken out for the benefit of a brother of the insured, and it is immaterial what arrangements are made between them for the payment of premiums.

5. SAME—ACTION ON POLICY—INSTRUCTIONS—TESTIMONY PREPARED BY INSURANCE INSPECTORS.
In an action on a life insurance policy, the court properly cautioned the jury to closely scan evidence prepared by defendant's inspectors, who offered in evidence written statements which they had obtained, tending to contradict witnesses for plaintiff.

In Error to the Circuit Court of the United States for the Southern District of Georgia.

This is an action on a life insurance policy. It was brought by Thomas C. Jeffords, a citizen of Georgia, against the Fidelity Mutual Life Association, a corporation under the laws of Pennsylvania. The action was brought in the city court of Savannah, Ga., and was removed into the court below on the application of the association. It is alleged in the petition that on December 29, 1894, the association issued to Martin A. Jeffords its policy of insurance, promising to pay $10,000 to Thomas C. Jeffords, and $3,000 to Edna Jeffords, within 90 days after satisfactory proof of the death of Martin A. Jeffords. It is averred that the insured and beneficiaries had complied with all the terms of the policy; that on July 29, 1896, Martin A. Jeffords died; that due notice of his death was given on September 3, 1896; and that a demand for payment had been made and refused notwithstanding 90 days had elapsed since furnishing proofs. A copy of the insurance policy was made part of the petition. The association filed the following pleas: First. A general denial that it was indebted. "Second. For further plea in this behalf, this defendant avers that the said plaintiff ought not to have and maintain his action aforesaid, for that the said alleged contract of insurance is void and of no effect, and not binding upon this defendant, because the same was obtained by fraud practiced upon this defendant by Martin A. Jeffords, in this: That the said Martin A. Jeffords, in making application for insurance on his life with this defendant, made the statements in such application a part of his contract or policy of insurance which is sued on in this case, and thereby covenanted to and with this defendant that he was at the time in good health and free from any and all diseases, sicknesses, ailments, or complaints, trivial or otherwise, except as therein stated, and that there was nothing therein stated which excepted pulmonary consumption, when in truth and in fact the said Martin A. was at the time afflicted with pulmonary consumption; whereby the said Martin A. warranted to this defendant in said contract that he was free from said diseases, sicknesses, ailments, and complaints, which warranty the said Martin A. then and there did violate and break, and did deceive and defraud this defendant; and this defendant avers that for this reason said contract is void and of no effect. Third. And for further plea this defendant saith that the said contract, the same purporting to be a policy of insurance, is void, for that the same was obtained from this defendant by the fraud practiced upon it by the said Martin A. Jeffords, in this: The said Martin A. Jeffords, in order to induce this defendant to enter into said contract of insurance, did represent to this defendant that he was at the time in good health, and free from any and all diseases, sicknesses, ailments, or complaints, trivial or otherwise, except as therein stated, and there was nothing therein stated which excepted pulmonary consumption, when in truth and in fact the said Martin A. was at the time afflicted with pulmonary consumption. And in this: That this defendant was further induced to enter into said contract by the representation made to it at the time by the said Martin A. that he had not consulted or been prescribed for by any other physicians or medical men during the last ten years next preceding the making of said application, except Dr. T. C. Jeffords, about three months prior to the application, for cold, and Dr. McRae, two years prior thereto, for pleurisy,

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when, in truth and in fact, on the 20th of February, 1894, which was about ten months (10) before said application, the said Martin A. had consulted and been prescribed for professionally by Dr. R. E. Hinman, who was a practicing physician at Atlanta, Ga., and said Dr. R. E. Hinman had informed him, the said Martin A., then and there, that he had incipient tuberculosis, and prescribed for him a change of residence to New Mexico or Arizona; and when, in truth and in fact, during the fall of 1894, the said Martin A. had consulted and been prescribed for professionally by Dr. Floyd McRae, a practicing physician of Atlanta, Ga., who told him he had consumption, and advised a change of residence from the city, and that he live in the open air. This was in the late fall or early winter of 1894, only a few weeks before the said representation above referred to was made to this defendant. And this defendant avers that all of these representations were material, all of them were false, and were known to said Martin A. to be false at the time he made them, and were willfully and corruptly made to deceive and defraud this defendant, and did deceive and mislead this defendant, who relied upon the same, all of which this defendant is ready to verify. Fourth. And, for further plea in this behalf, this defendant saith that the said Thomas C. Jeffords ought not to have and maintain his action aforesaid, for that this contract of insurance now sued upon by the said Thomas C., the plaintiff, was gotten up by him, the said Thomas C., for his own benefit; that he conducted the negotiations, paying up all premiums and other charges, and that he persuaded and induced the said Martin A. to procure the said insurance for the benefit of him, the said Thomas C.; that the introduction of the said Edna C. Jeffords into the contract as a beneficiary was an afterthought, and was done merely to try and save appearances, it being the original purpose of said Thomas C. to take out a policy payable only to himself; and this defendant avers that the said Thomas C. well knew at the time that his brother Martin A. had consumption, and could not live long, and the said Thomas C., being himself at the time one of the medical examiners for this defendant, represented to the other physician who took his place in the examination of the said Martin A. that the said Martin A. was sound and free from all diseases, and thereby induced said physician to forego and omit to make a complete examination himself of the said Martin A.: all of which this defendant is ready to verify."

These pleas were subsequently amended by alleging that the association was a mutual insurance company; that each insurer became a member of the association; and that its rules and regulations became parts of the policy. According to these rules, it was alleged that every person desiring to become a member must make an application; that the truthfulness of the statements contained in the application should be the basis of the policy; that no person was eligible to membership who was not in all respects in good health; and that Martin A. Jeffords on December 21, 1894, made such application for insurance and membership, and therein warranted the truthfulness of the statements made and their materiality.

On the trial, the policy, together with the application, was offered in evidence. The policy was correctly described in the declaration as above stated. The material parts of it that are necessary to an understanding of the case are the following: "The Fidelity Mutual Life Association, in consideration of the application for this policy, which is made a part hereof, a copy of which is hereto attached, and the payment to said association of forty and $^{4}/_{100}$ dollars on the 29th days of the month of December, March, June, and September for the period of twenty years from the date thereof, etc., does hereby receive Martin A. Jeffords, of Sylvester, county of Worth, state of Georgia, as a member of said association, and issues this policy of insurance," etc., "subject, however, to all the requirements hereinafter stated and the conditions hereon indorsed, which are hereby referred to and made a material part of this contract." The following is one of the conditions forming part of the policy: "If any statement contained in the application on which this policy is issued be untrue in any respect, then this policy, except as herein provided, shall be ipso facto null and void."

The applications signed by the insured contained the following among other declarations and statements:

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"(1) I hereby apply to the Fidelity Mutual Life Association of Philadelphia, Pa., for a policy of insurance, to be issued in pursuance of this application." "(3) That I am now in good health, and am free from any and all diseases, sickness, ailments, or complaints, trivial or otherwise, except as here stated: Yes." "(5) That I have never had or been afflicted with any sickness, disease, ailment, injury, or complaint, except as here stated: Pleurisy, about two years ago; cold, about one week, about six months ago. (6) That the last physician I consulted or who prescribed for me was Dr. T. C. Jeffords, of Sylvester, Ga., about three months ago, for the sickness here stated: Cold, about one week, about six months ago. (7) That I have not consulted or been prescribed for by any other physician or medical man during the last ten years, except as here stated: Dr. McRae, Atlanta, Ga.; pleurisy, about two years ago. I hereby agree and bind myself as follows: That the truthfulness of the statements above made or contained, by whomsoever written, are material to the risk, and are the sole basis of the contract with the said association; that I have signed this application in my own proper handwriting; * * * and that, if any concealment or untrue statement or answer be made or contained herein, then the policy of insurance issued hereon and this contract shall be ipso facto null and void."

The evidence showed that Thomas C. Jeffords was the brother, and that Edna Jeffords was the wife, of the insured. The application for insurance was made December 21, 1894, the policy was issued December 29, 1894, and the insured died of consumption July 29, 1896. The evidence was conflicting as to whether he had consulted and been prescribed for within the last 10 years by other physicians besides those which he named. The evidence was conflicting as to his condition of health at the date of the application. Some of the evidence tended to show that he was then afflicted with "incipient tuberculosis"; other evidence tended to show he was in good health, and that he did not at that time have consumption.

The plaintiff in error requested the court to give the following charges, and reserved an exception to the refusal to give each:

"(1) Under the law of this state, as set forth in section 2097 of the Code, the representations contained in an application for a policy of insurance are covenanted to be true. If you believe that on the 21st of December, 1894, when Martin A. Jeffords made application for insurance, he was then afflicted with pulmonary consumption, he stated in his application that he was free from disease, trivial or otherwise, then I charge you that this would void the policy, and the plaintiff would not be entitled to recover, for the reason that consumption is a disease which, from its nature, does affect the extent of the risk. This would be true also without regard to the good faith of the applicant, as, he having covenanted that the representations were true, the question of good faith does not enter into it.

"(2) I charge you, further, that if you believe he did consult Dr. Hinman in February, 1894, or Dr. McRae in October, 1894, and that he stated in his application that he had not consulted any physician in ten years, except Dr. Floyd McRae two years before for pleurisy, then this was a material misrepresentation (which also conflicted with his contract and with the by-laws of the association), because it shut out from the company a very high source of information, which it was entitled to, as to his physical condition, and would defeat the right to a recovery, provided you also believe that these doctors had actually found that he had consumption at the time they examined him.

"(3) If you believe from the evidence that the deceased, Martin A. Jeffords, consulted Dr. R. E. Hinman, as a physician, during the month of February, 1894, and that the said Dr. R. E. Hinman, in the capacity of a physician, and at the request of said Martin A. Jeffords, made a physical examination of him, you will find for the defendant."

The refusal to give each of these three charges is assigned as error.

The plaintiff in error reserved exceptions to each of the following charges given by the court:

"(1) Now, with regard to that plea [referring to the plea that the insured had consumption], I charge you, as matter of law, that if the proof fails to satisfy you, to the extent which the law heretofore read to you has defined,

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that Martin A. Jeffords intentionally misled the defendant company; that he knew, or had reason to believe, that he had consumption at the time of his application; if it fails to show you that he knew, or had reason to believe, he had consumption, and, thus knowing and believing, he intentionally and fraudulently withheld the facts from the defendant company,—you would not be justified in defeating a proper recovery on account of that plea.

"(2) With the provisos I have already expressed, your inquiry, then, on this particular plea is this: Has the defendant produced such a preponderance of proof as will satisfy your minds that Martin A. Jeffords knew, or had reason to believe, that he was afflicted with consumption at the time the insurance was applied for, and that he fraudulently withheld the facts from the company?

"(3) A man cannot be held to warrant that he is free from disease as a prerequisite to a valid contract of insurance. If he acts in good faith, and gives all the information asked, and in doing so states the facts truly as he understands them, it is all the law requires of him, or of the beneficiary of the policy for the recovery of the amount which he has thus attempted to secure.

"(4) The court charges you that if you believe from the evidence that the insured, Martin A. Jeffords, had consulted Dr. Hinman, or had been prescribed for by him in February, 1894, and willfully and fraudulently withheld this fact from the defendant company, it would void the policy of insurance, and neither his brother nor his widow could recover thereon, and you would be obliged to find for the defendant.

"(5) I instruct you that the proof must preponderate to show, not only the fact of such consultation or prescription, the withholding of the fact, and that it was knowingly done and with a fraudulent purpose. If this fact existed, and it was merely omitted by the insured, and if the proof fails to satisfy you, under the rules I have given you, that he made the other fraudulent and material concealments charged as to physical condition, under these circumstances the omission would not be of such a character as would void the policy of insurance.

"(6) In other words, the presence or absence of good faith on the part of Martin A. Jeffords throughout would be exceedingly important in determining whether or not the omission to mention the alleged consultation and prescription of Dr. Hinman would be of that character which would void the policy. If you are justified in concluding from the evidence that it was a mere case of honest forgetfulness, I charge you that it would not, in itself, render the policy void.

"(7) To sum up my instructions upon this point, I repeat that if, with regard to the consultation and prescription with Dr. Hinman, you believe that the insured was guilty of fraudulent misrepresentations to the company, you ought to find against the plaintiffs, but, if you believe that it was a case of honest omission, you ought not to find against the plaintiffs on that plea.

"(8) To sum up the instructions in this case, notwithstanding its great prolixity, the multitude of witnesses, and the multitude of pleas, the true issue is this: Did Martin A. Jeffords apply for this policy of insurance honestly and in good faith? Did he truthfully and sincerely communicate to the company the answers to the questions propounded which were material for its protection? If he did this, withholding nothing fraudulently, concealing nothing fraudulently, and not intending to deceive, his widow is entitled to recover the amount stipulated in the policy, with interest thereon from the date of proofs of loss and costs of the suit which she has brought. If, on the other hand, the defendant has produced evidence which preponderates to show that Martin A. Jeffords sought to secure insurance dishonestly, knowing or having reason to believe that he was afflicted with consumption, which knowledge he did not communicate to the company, but fraudulently withheld it, and knowing that he had been examined by a physician other than Dr. McRae and his brother, and fraudulently withholding that fact with the purpose of misleading the company, his widow would not be entitled to recover, and you should find for the defendant, with costs of suit on the action brought by her. The same statement is applicable with regard to the action brought by Thomas C Jeffords for the amount stipulated to be due him on the policy of insurance.

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"(9) I charge you that, whether Thomas C. Jeffords had such an interest or not, his brother Martin A. Jeffords had the right to insure his own life in favor of Thomas C. It appears from the policy that this was done, and, if the insurance company accepted the payment of the premiums from Martin A. Jeffords, they cannot now be heard to say that they did not insure Martin A. for the benefit of his brother, and that he had no insurable interest. The company understood the terms of its own policy. It knew it was payable to Thomas C. Jeffords. It knew it was taken out by Martin A. Jeffords, and, not having raised the objection when these facts were ascertained, its plea on that subject cannot now be maintained.

"(10) You heard the testimony of the other witnesses with regard to one or both of them [referring to the 'inspectors,' Gary and Milliken, who represented the life association in procuring evidence], and, while their business is legitimate, the court thinks it proper to instruct you that you should closely scan evidence prepared by them, or with their assistance, or under their direction, personal presence, or influence, and not conclude the rights of the parties thereby unless it is right and proper, in view of all the evidence in the case. It is perhaps fair to presume that these inspectors are experts in their business, and it is the duty of the jury to carefully consider the statements of Mrs. Jeffords and Dr. Hall, and to determine, in view of all the evidence, whether they were obtained by the inspectors, or either of them, by personal influence, or by promises of settlement of a particular claim, or by threats, or by the skillful use of language in writing, and whether or not they gave a coloring to the statements of the witness or witnesses which they or either of them did not intend, and by which an improper advantage was taken of that party or witness. This would be especially the duty of the jury if it appears from these statements that, by hers, Mrs. Jeffords wholly surrenders her right to any claim against the company, and practically admits that her policy was void, and from the statement of Dr. Hall that he admits, or is made to admit, facts which would indicate his carelessness as a physician and his unfitness as a medical examiner for the company." The giving of each of these ten charges is assigned as error.

The trial resulted in a verdict for Thomas C. Jeffords for $9,969.20, on which judgment was entered. This writ of error is sued out by the Fidelity Mutual Life Association to reverse that judgment.

Alex C. King and Pope Barrow (King & Spalding and Barrow & Barrow, on the brief), for plaintiff in error.

Fleming G. Du Bignon (Du Bignon & Stephens, on the brief), for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge (after stating the facts as above). 1. The failure of the court to give the three charges requested by the plaintiff in error, and the giving of the first eight against its objection, all of which we have set out in full, raised practically the same question. The distinguished counsel for the plaintiff in error contend that the application for insurance was made the foundation of the policy, and that its statements are covenanted to be true, and that if they are not true the policy is void; that is, it is void whether the untruth be intentional or not. They assert that under the Georgia law the application for insurance in this case warrants every material statement to be true, and that the question of good faith is not involved. The charge of the court was upon the theory that the applicant for insurance in this case did not warrant the truth of every material statement in his application, and that an honest mistake, even as to a material fact, would not void the policy. On the one hand, it is contended that if the insured was afflicted with "incipient

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tuberculosis" at the date of his application, although he believed he was free from disease, that the policy would be void. On the contrary, it was held by the court below that, even if he had such disease, if he was entirely ignorant of the fact, and answered the inquiry in reference to his condition in good faith, the policy would be valid. Again, it is contended that if the insured answered that he had been examined only by certain physicians within the last 10 years preceding his application, failing to name other physicians who had examined him, this omission would be fatal to the policy, although he answered in good faith, having failed to remember his examination by other physicians. On the contrary, it was held that an honest omission to name all the physicians who had examined him, if he answered in good faith, giving his best recollection and making no willful misrepresentation or fraudulent concealment, would not void the policy. These are the conflicting contentions raised by the refusal to give the charges asked and by the giving of the charges to which exceptions were taken.

The contract of insurance was made and delivered, and the premiums paid, in the state of Georgia, where the insured resided. It is therefore a Georgia contract, and is governed by the laws of that state. Society v. Pettus, 140 U. S. 226, 11 Sup. Ct. 822, 35 L. Ed. 497. The following are sections of the Code of Georgia of 1895:

"Sec. 2097. Application, Good Faith. Every application for insurance must be made in the utmost good faith, and the representations contained in such application are considered as covenanted to be true by the applicant. Any variation by which the nature, or extent, or character of the risk is changed, will void the policy."

"Sec. 2099. Concealment. A failure to state a material fact, if not done fraudulently, does not void; but the willful concealment of such a fact, which would enhance the risk, will void the policy."

"Sec. 2101. Willful misrepresentation by the assured, or his agent, as to the interest of the assured, or as to other insurance, or as to any other material inquiry made, will void the policy."

These sections are made applicable to both life and fire insurance. Code Ga. § 2117.

It may be stated as a general rule that answers to questions propounded to insured in an application for insurance, unless they are clearly shown by the form of the contract to have been intended by both parties to be warranties to be strictly and literally complied with, are to be construed as representations and not as warranties. Insurance Co. v. Raddin, 120 U. S. 183, 7 Sup. Ct. 500, 30 L. Ed. 644. One of the statements that the insured was required to make to obtain the insurance was that he was "free from any and all diseases," except as stated. Placing the construction upon the application which the plaintiff in error contends for, the policy would be made void if the insured had a disease material to the risk, although he was entirely ignorant of the fact. It might be a disease so undeveloped that it could not be discovered by an expert physician, and yet if it afterwards developed, and it could be shown that the germs of the disease were active in the insured at the date of his application, the policy would be made void. We cannot believe that this contract is fairly susceptible to such construction. Such a construction ought to

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be avoided unless clearly demanded by legal rules. In the absence of explicit and unequivocal words requiring such interpretation, the court should not conclude that the insured took a life policy with the distinct understanding that it should be void, and all premiums paid forfeited, if at the time of his application he had a disease of which he was entirely unconscious. Moulor v. Insurance Co., 111 U. S. 335, 4 Sup. Ct. 466, 28 L. Ed. 447. We do not think that it was the purpose of the insurers to exact from the insured, as a condition precedent to a valid contract of insurance, a guaranty against the existence of diseases of which he had no knowledge, and which even a skillful specialist, on careful examination, would be unable to detect.

We are not unmindful of the fact that the insured distinctly certifies that the statements in his application are true, and that he agrees that, if any concealment or untrue statement or answer be made, the policy of insurance shall be void. Referring to the Georgia statute, and probably without the statute, concealment means "willful concealment." By that statute it is only the willful misrepresentations and willful concealments that affect the policy. And when the insured agrees that the policy shall be void if it contains any untrue statements, what does he mean? He surely means "untrue," in the sense of the law which governs the contract. He means, to quote the Georgia statute, that there is no willful concealment and no willful misrepresentation, and that his statements are made in the utmost good faith. Construing a life policy, Mr. Justice Harlan asked what was meant by true and untrue answers, and he answered the question, saying:

"In one sense, that only is true which is conformable to the actual state of things. In that sense, a statement is untrue which does not express things exactly as they are. But, in another and broader sense, the word 'true' is often used as a synonym of 'honest,' 'sincere,' 'not fraudulent.' Looking at all the clauses of the application, in connection with the policy, it is reasonably clear—certainly the contrary cannot be confidently asserted—that what the company required of the applicant, as a condition precedent to any binding contract, was that he would observe the utmost good faith towards it, and make full, direct, and honest answers to all questions, without evasion or fraud, and without suppression, misrepresentation, or concealment of facts with which the company ought to be made acquainted, and that by so doing, and only by so doing, would he be deemed to have made 'fair and true answers.'" Moulor v. Insurance Co., 111 U. S. 335, 345, 4 Sup. Ct. 466, 28 L. Ed. 447.

The application in the case at bar does not contain the word "warranted." It purports to be a declaration or statement, and not a warranty. In Moulor v. Insurance Co., supra, the word "warranted" was used in the application which was part of the contract sued on. The language in the application for insurance in that case was: "It is hereby declared and warranted that the above are fair and true answers to the foregoing questions." Notwithstanding this language, the court held that there was not a warranty in the strict sense that would make the contract void if there was a statement not literally true made in answer to the questions. The court held that, in the absence of intentional misstatement or fraudulent misrepresentation, the contract of insurance was valid.

Recently, the supreme court of Georgia has had occasion to con-

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strue section 2099 of the Georgia Code. In the court below the request had been made for a charge that the policy would be made void if the applicant failed to give the names of other insurance companies to which he had applied for insurance. He had given the name of one, when he had applied to several. A charge was also asked that the policy would be made void because he had given the name of only one physician who had attended him during the last 10 years, when, in fact, during that time he had been attended by several others. The trial court refused to give these charges, and the refusal was assigned as error in the supreme court. It was held, Fish, J., delivering the opinion of the court and all the justices concurring, that the court did not err in refusing to give the charges. "It will be seen," said the learned justice, "that, if the instruction requested correctly stated the law, a policy would be avoided because of a mere omission upon the part of the assured to state a material fact, without reference to the motive by which he was influenced in omitting to make such statement. An omission to state is the equivalent of a failure to state, and by our Civil Code (section 2099) it is expressly provided as follows: 'A failure to state a material fact, if not done fraudulently, does not void; but the willful concealment of such a fact, which would enhance the risk, will void the policy.' The request under consideration was not adjusted to the section of the Code we have just quoted, because if the failure to state the fact was the result of an oversight or other cause, and was not done fraudulently, it would not avoid the policy. The omission from the request of the word 'fraudulently' put it in direct opposition to the Code provision above referred to, and it was therefore properly refused by the court." Association v. Farley, 102 Ga. 720, 744, 29 S. E. 615.

2. Martin A. Jeffords applied for and obtained the policy on his own life. He is conclusively presumed to have an insurable interest in his own life. Bliss, Ins. § 17. He directed who should be the beneficiaries. His wife was to receive $3,000, and his brother, Thomas C. Jeffords, $10,000. This latter sum, by agreement between the parties, was "to protect his child or children." He had one child to survive him. The first premium was paid out of the money of Martin A. Jeffords. The other premiums were paid by Thomas C. Jeffords for his brother. The insurance company receipted for the money as paid by Martin A. Jeffords. The fact that Thomas C. Jeffords paid the premiums did not invalidate the policy. On the facts stated, it was not a wager policy. A man may take out a policy of insurance upon his life for the benefit of his brother, and it is immaterial what arrangement is made between them for the payment of the premiums. Insurance Co. v. France, 94 U. S. 561, 24 L. Ed. 287; Union Fraternal League v. Walton, 109 Ga. 4, 34 S. E. 317, 44 L. R. A. 424. It follows that the court did not err in giving charge numbered 9.

3. The court charged the jury that they should closely scan evidence prepared by William E. Gary and R. C. Milliken, inspectors of the defendant in error. Gary obtained a written statement of Mrs. Jeffords, the widow of the insured, and Milliken obtained a written statement from Dr. Hall. These statements were offered in evidence,

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and tended to contradict the evidence of Mrs. Jeffords and Dr. Hall given on the trial. The charge referred to is numbered 10, and is set out in full in the statement of the case. The giving of this charge is assigned as error. William E. Gary, one of the inspectors, sought and had two interviews with Mrs. Jeffords,—one in Georgia and one at her home in Florida. Gary, on cross-examination, stated that he informed her of the "result" of some suit recently brought against an insurance company where the defense of fraud and conspiracy was made, and he told her "that if the company refused to pay her she could not recover * * * unless the courts reversed themselves. I cited cases, no doubt." He denied making any threats, saying: "I have been in this business twenty years, and I never make any threat in any case, sir." An important question in the case was whether Dr. Hinman had examined the insured after the policy was issued, or in 1894, before it was issued. Gary testified that Mrs. Jeffords said "it was in 1894." Mrs. Jeffords testified as to the interviews. She said that "Mr. Gary seemed very sympathetic"; that the paper she signed was written in his presence, and partly from his dictation; that Gary assured her that her claim would be paid in full; and that she was very much agitated when she wrote the paper. The statement signed by Dr. Hall, which was offered in evidence, was obtained by the other inspector, R. C. Milliken. Dr. Hall's evidence tended to show that the statement was not entirely correct. Milliken approached Hall, and asked him to sign the paper. Dr. Hall testified:

"Q. Under what circumstances did they get that statement from you? A. He [Milliken] was going over there. Seemed to be gathering up proofs for his side of the case. He was wanting to write them up and outline the manner in which they might not be mistaken, and that my interrogatories might corroborate such statement as I made to him. And at that time I told him, when he drew up those papers, that some things are not fresh in my mind at the moment, and I told him at the time, if I recollected things more clearly, I should correct them. Q. You reserved the right to make corrections? A. Yes, sir."

Dr. Hall's evidence tended to show that the statement prepared by Milliken and signed by him was materially inaccurate.

In this state of the evidence, we think the court was amply justified in giving the instructions. These inspectors were the agents of the plaintiff in error. They were engaged in preparing a defense in this case. An insurance company can only act through its agents. It is, as the learned trial judge said, a legitimate business to investigate the facts of a case that will probably be litigated. Still, the fact that agents so employed are likely to be partial to their principals is well known. And, if the mode of obtaining admissions indicates that a skilled and experienced person has unduly influenced or unfairly induced admissions, such facts should be closely scanned by the jury, and should greatly affect the weight to be given to the admissions. The position of these inspectors or agents preparing a case is analogous to that of an attorney performing the same service. If an attorney becomes a witness in a case he is trying, it is perfectly proper for the jury, in weighing his evidence, to consider his relation to the case, and his conduct in procuring evidence. In common-

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law courts it was formerly doubted whether a lawyer retained in a cause, and who was taking part in the trial, was a competent witness (1 Whart. Ev. § 420); and in the civil law the advocate or procureur of a party was not received as a witness. "Their testimony," says Pothier, "would be liable to the suspicion of partiality, if they were witnesses in favor of their parties, and there would be an indecency in admitting them as witnesses against them." 1 Poth. Obl. (Evans) 405. Referring to the proof of admissions proved by an attorney in the cause as made to him by the opposing party, Sanford, J., speaking for the court, said: "Moreover, testimony by an attorney of such admissions, made to him by the opposite party, affecting a really doubtful or litigated point, are always regarded with extreme suspicion and distrust by both courts and juries." Little v. McKeon, 1 Sandf. 607, 609. The parties themselves, and, of course, their agents and attorneys also, are now competent witnesses. Their evidence goes to the jury as that of any other witnesses. The rules that once excluded them as witnesses have long ceased to be rules, but their evidence goes to the jury to be considered by them in view of the witness' relation to the case. The question of credibility of every witness is for the jury. As the jury should consider such relation, there can be no error in the court's properly calling it to their attention. The court, we think, did not err in giving this charge. The judgment is affirmed.

(107 Fed. 412.)

UNITED STATES v. NORTON et al.

(Circuit Court of Appeals, Fifth Circuit. March 19, 1901.)

No. 1,000.

1. POSTMASTERS—MONEY ORDER FUNDS—WHAT CONSTITUTES.

   Funds in other offices on which a postmaster could draw do not constitute money-order funds in his custody, within the meaning of the postal laws and regulations.

2. SAME—ACTION ON BONDS—PLEADING—AMENDED PETITIONS—NEW ACTION—LIMITATIONS.

   The original petition in an action on a Texas postmaster's bonds counted on his nonpayment of moneys which actually came into his hands from money orders sold, fees thereon, etc., and subsequent amended petitions counted on moneys which a third person, not a regularly authorized assistant or clerk, had fraudulently acquired by filling out blank money orders, advice forms, etc., and causing them to be paid at other post offices, the fraud being alleged to be due to his either having allowed such unauthorized person access to his supplies, or to his having failed to comply with department regulations as to their custody. *Held* that, conceding that moneys thus fraudulently acquired by a third person constituted funds in the postmaster's custody, within the meaning of the postal laws and regulations, the amended petitions stated a new and different cause of action not within the original lis pendens, and hence did not relate back to the commencement of the action pursuant to the Texas practice, and take the place of the original petition, so as to prevent limitations from running in favor of the sureties on the new cause of action alleged in the amendments.

3. EVIDENCE—EXCLUSION—HARMLESS ERROR.

   A count in a petition against a postmaster's bondsmen alleged that he did not faithfully perform all the duties and obligations imposed on him

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and required of him by law by the rules and regulations of the department in connection with the money-order business, and had not paid moneys which came into his hands as postmaster. Thereunder certified copies of bonds, transcripts of the money orders of the department, and evidence of due demand for balances claimed as due were offered and admitted. Thereupon the government offered in evidence money orders signed, or purporting on their face to be signed, by him, on blanks furnished him, drawn on other postmasters, and paid to the payee named therein or to his assignee, and aggregating the amount of the shortage sued for. *Held*, that it was error to exclude such orders, but that it did not constitute ground for reversal, where it was conceded that proof to rebut the prima facie case established thereby was at the command of the sureties, to be offered if required.

4. PRIMA FACIE CASE—INSTRUCTING FOR DEFENDANTS—HARMLESS ERROR.
Judgment will not be reversed for error in instructing a finding for defendants, where the evidence established a prima facie case for plaintiff, it being conceded that evidence sufficient to rebut the same was at the command of defendants, to be offered if required.

In Error to the District Court of the United States for the Northern District of Texas.

On June 25, 1895, and on August 5, 1895, the plaintiff in error instituted three suits on the official bonds of Charles M. Norton, as former postmaster at Calvert, Tex., which suits were afterwards consolidated by order of court. The original petitions in these suits alleged, as a breach of the postmaster's bonds, that he had not paid all moneys coming into his hands as postmaster between 1891 and 1895 from postage collected, postage stamps sold, stamped envelopes sold, and from revenues derived from the rent of boxes, etc., and that he had retained the several sums sued for. On December 5, 1896, the plaintiff in error filed its first amended original petition, wherein it assigned, as a breach of the bonds, that the postmaster had not paid to the United States the balance of all moneys which came into his hands as postmaster in connection with the money-order business from February 7, 1891, to 1895, from money orders sold, fees thereon, and from other sources connected with the money-order business, and that he withheld the same; specifying the amounts so collected and coming into his hands. On April 10, 1899, the plaintiff in error filed its second amended petition, wherein it assigned, as breaches of the bonds: (1) That Norton had not paid over and accounted for certain sums of money which came into his hands as postmaster for money-order business from February 7, 1891, to 1895; (2) that Norton had not kept his money-order blanks, etc., under lock and key in a secure place to which unauthorized persons did not have access, by reason whereof certain sums of money specified were fraudulently appropriated, embezzled, and abstracted by one A. C. Love, who was not the deputy of Norton authorized to have access to said money-order blanks, but who was in the employ of Norton, had access to the blanks, and abstracted the same and other money orders, etc., to the amount named. On November 20, 1899, the plaintiff filed its third amended original petition in the consolidated cases, and assigned the following breaches of the bonds, to wit: (1) That between February 26, 1891, and March 30, 1895, from the money-order business, etc., Norton withheld $33.10, $1,454.98, and $1,108.50, moneys so collected or coming into his hands as postmaster; (2) that Norton, by his consent and authority, allowed A. C. Love, a clerk under him, to have access to the blank money orders, advice forms, etc., and to transact money-order business for him, pay money orders, sign Norton's name, etc.; and that Love, between February 7, 1891, and March 30, 1895, did abstract, embezzle, and fraudulently misapply and convert said sums of money, which sums came into Love's hands between said dates by reason of his filling up blank money orders and causing the same to be paid at other post offices. On April 23, 1900, the government filed its fourth amended original petition, which, in addition to the breaches assigned in the third amended original petition, added the third count, in which it assigned, as a breach of the bonds, that Norton did not keep his stock of money orders and advices in his own custody, under lock and key, in a secure place to

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which unauthorized persons did not have access, by reason of which failure A. C. Love, not the lawful money-order deputy, did fraudulently appropriate, embezzle, and abstract from the money-order funds of the United States the sum of $2,596.50, by abstracting and using post-office money orders, forms, etc., forging Norton's name, and drawing the money thereon from other post offices. The defendants in error, who are the sureties on the several bonds of the postmaster, Norton, by special demurrer and by plea set up the statute of limitations to the amended petitions of the plaintiff in error filed after 1896, on the ground that three years had elapsed from the final closing of Norton's accounts before the filing of these amended petitions, and that, therefore, as to the sureties, the claim of the government was barred. The trial court sustained the demurrers to the second and third counts in the fourth amended petition, upon which the case was tried. On the trial the government offered duly-certified copies of the bonds of the postmaster, and three certified transcripts from the auditor of the treasury of the post-office department, one dated June 14, 1895, the other two June 19, 1895, which showed balances due from the postmaster to the government in the amounts charged in the declaration. The plaintiff also offered in evidence money orders signed by the post-office department of the United States by the postmaster at Calvert, Tex., to wit, Charles M. Norton, and paid by the United States post-office department at post offices other than the Calvert post office. The aggregate amount of the sums so paid on such money orders was the amount sued for by the plaintiff in this consolidated action. The plaintiff also showed that these money orders had been taken from the Calvert post office by one A. C. Love, and by him filled up and signed, and cashed at post offices other than the Calvert post office. The court instructed the jury peremptorily to find in favor of the United States against C. M. Norton for the amount claimed, and to further find in favor of the defendants John H. Drennan, Rudolf Oscar, William Briggs, John T. Garrett, Emil Conitz, and Thomas B. Jones, sureties on the bonds of the postmaster.

Wm. H. Atwell, for plaintiff in error.

D. C. Colinger and Geo. Clark, for defendants in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge, after stating the case, delivered the opinion of the court.

The filing of the original petition in 1895, and the certified transcripts of the postmaster's account showing the balance claimed in the petition, make it clear that the postmaster's accounts were settled, within the meaning of section 3838 of the Revised Statutes, in June, 1895, more than three years before the filing of the amendments which set up the breaches of the bonds as alleged in the second and third counts of the amendment on which the trial was had. According to the Texas practice, the amended petition takes the place of previous pleadings presented by the plaintiff, and what of earlier pleading is not reproduced in the amendment is abandoned. In this case the first count in the later amendments, and in that on which the trial was had, substantially carries forward the allegation of the breach that was presented in the original petition; and it is claimed by the learned district attorney who represented the government on the trial in the district court and in this court that the second and third counts, as thereafter embodied in the amendments filed, were only expansions of the original charge, that the suit is on the same bonds, that it is for the same amounts of money due by the postmaster to the government, and that the matter introduced by the second and third counts is within the lis pendens as originally insti-

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tuted, and therefore that those amendments relate back to the institution of the action, and exclude the operation of the statute of prescription. It may be true that the postmaster is liable for the amount claimed, whether it actually came into his hands as postmaster, or was lost to the government by his failure to comply with the regulations of the post-office department in reference to the custody of money-order blanks and letters of advice; but the statute of prescription applied in this case was not passed for the benefit of the postmaster, and has no application to him, but relates only to the sureties on his bond, by whom it is here interposed. The suit, as originally instituted against him and them, was for money that actually came into his hands from postage collected, etc. The suit sought to be enforced against him and the sureties, as shown clearly by the record, is for money that never came into his hands at all,—either into his hands individually, or into the hands of any authorized assistant or clerk whose actual custody was constructively his. The pleadings clearly import what the bill of exceptions says the plaintiff showed by proof,—that these money orders had been taken from the Calvert post office by one A. C. Love, and by him filled up and signed, and cashed at post offices other than the Calvert post office. The able district attorney suggests, with some hesitancy, that all the money-order funds upon which the Calvert postmaster could draw in any other offices, however numerous or wherever located, constitute money-order funds in his custody, within the meaning of the statutes and the regulations of the department. He admits that he cannot support this position by any adjudicated case; and an examination of the different provisions of the statutes and of the rules and regulations of the post-office department appear to us to forbid the acceptance of such a proposition. What constitute money-order funds in the hands of a named postmaster appear to be sufficiently defined and described to exclude the contention which the district attorney with hesitancy submits. Even if this contention were sound, it would not affect the question we are considering here, as to whether the second and third counts in the government's petition constitute, or are equivalent to, a new suit, to the extent that it introduces matter as against the sureties not within the original lis pendens, and which cannot be allowed such relation back to the allegation of the original petition as will exclude the operation of the statutes of limitations as to the matter pleaded in these counts. From a very careful consideration of the case of Governor v. Burnett, 27 Tex. 32, and the case of Railroad Co. v. Wyler, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. Ed. 983, we are satisfied that the district court did not err in sustaining the demurrer of the defendants in error to the second and third counts of the government's petition. It is true that the pleading of the plaintiff does not in express terms allege that the accounts of the postmaster were settled in June, 1895, or at any other given date; but the filing of the original petitions at the time they were filed, declaring on the balances due the government from the postmaster, as was done, and supported by the certified transcripts from the auditor's office, which possibly did not appear until the trial, render the counts really and practically as subject to demurrer on the ground

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of lapse of time as they are to the plea, which there was no disposition to dispute. Therefore, it is immaterial that the demurrer, as distinguished from the plea, was permitted to avail for the defendants' protection.

For the same reasons it appears equally clear that the court did not err in sustaining the objection of the defendants in error to the introduction of the postal laws and regulations relating to the care and custody of money-order blanks and applications. The second error assigned is founded on this action, and urges that there "was error for the reason that plaintiffs had showed that the shortages for which they sued had occurred by reason of blank money orders and advices which had been sent to Norton as postmaster at Calvert, Texas, being taken out of his possession in some way by one Love, who had filled same up and drawn funds from post offices in the United States other than the Calvert office. It having been shown that Love was not an unauthorized person." The last line in the above quotation finds no support in the proof admitted or offered as shown by the printed record.

The third error assigned is that "the court erred in sustaining the objection of defendant sureties to the introduction by plaintiffs of certain money orders which had been paid out of the money-order funds of the United States at post offices other than the Calvert post office, and which in the aggregate amount equaled the shortage sued for in this consolidated suit, which said money orders were upon the blank orders and advices previously furnished by the post-office department to Charles M. Norton, postmaster at Calvert, Tex., and which said blank orders and advices so sent to the Calvert office as aforesaid had been taken therefrom, and filled out in letters and figures upon other offices of the United States, and cashed thereat; the court admitting them in evidence only as to defendant Norton, and not as against his sureties. This was error, because he was charged to keep them safely." The trial court held that the first count in the plaintiff's fourth amended original petition was not obnoxious to the defendants' general demurrer. As the defendants took no cross writ of error, this ruling is not complained of here. This count being good as against all of the defendants, competent proof tending to support its allegations was admissible against all of them. The certified copies of the bonds, the three transcripts from the auditor of the treasury for the post-office department certified to be true and correct transcripts from the money-order account books of the post-office department, and evidence of due demand having been made of the postmaster for the balances claimed as due, had all been offered and admitted when the plaintiff offered in evidence the certain money orders referred to in this assignment. The money-order blanks, including the applications for orders, the order itself, and the advice, are all made on prescribed forms duly furnished the postmaster of each money-order office, with such recorded statements thereof and reports thereon as enable the department to trace the same, and require the postmaster to account for all received by him. The law and the regulations and the uniform practice require that, before issuing a money order to an applicant, the postmaster, or his authorized assistant or clerk, shall receive in cash, in legal-tender money or national

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bank currency, the amount of the order and the fees for issuing the same, and the money so received thereby becomes money-order funds in the custody of the postmaster receiving it, either in person or by his authorized assistant or clerk. It is made a penal offense for the postmaster to deliver any such money order without first receiving the amount thereof, and the fees for the issuance thereof, in cash. It must, therefore, we think, be clear that the production of money orders, signed, or purporting on their face to be signed, by the postmaster, on blanks that had been furnished him, drawn on the postmasters of other offices, and paid by other offices to the payee named in the order or to his assignee, is evidence tending to prove the receipt into the custody of the postmaster of post-office money-order funds; and that this, with the other proof that had been offered and admitted, in the absence of any contradictory proof (none having been offered by the defendants), would show a prima facie case against all of the obligors in the postmaster's bonds sufficient to establish the charge in the first count,—that the postmaster did not faithfully discharge and perform all the duties and obligations imposed upon him and required of him by law and by the rules and regulations of said post-office department in connection with the money-order business of said post-office department, and had not paid the moneys which came into his hands as postmaster, as claimed in the first count. The action of the court in sustaining the objection to the introduction of this proof as against the sureties seems to us to have been erroneous. It is clear to us, however, from the whole record, as it must have been to the trial court, that, while there was offered no contradictory proof to rebut the prima facie case as stated above, such proof existed and was substantially conceded to be at the command of the defendant sureties, to be offered, if required, to amply show that the shortage for which the government sued had occurred by reason of blank money orders and advices which had been sent to Norton as postmaster at Calvert, Tex., being taken out of his possession in some way by one Love, who had filled same up and drawn funds from post offices in the United States other than the Calvert office, and that, in fact, no money therefor had been received by the postmaster, or by any duly-authorized assistant or clerk, if by any one, previous to the payment thereof to the payee named in the order. This third assignment of error, which we must think is well taken, is therefore "error without injury," and does not constitute ground for reversal.

In like manner, and for similar reasons, the fifth error assigned, namely, that the court erred in instructing the jury to find against the plaintiffs as to their suit against the sureties of the defendant Charles M. Norton, is technically well taken, not on the grounds which the assignment suggests, but because, besides the money orders offered as evidence, and which were excluded as against the sureties, there was sufficient proof admitted to make a prima facie case such as would put the sureties, as well as the postmaster, on their defense. This error, however, like the one just disposed of, and on the grounds suggested in the consideration of that action of the court, is in like manner "error without injury." The judgment of the district court is affirmed.

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(107 Fed. 418.)

MUTUAL RESERVE FUND LIFE ASS'N v. SIMMONS.

(Circuit Court of Appeals, First Circuit. March 8, 1901.)

No. 332.

1. LIFE INSURANCE—TERMS OF POLICY—PROVISION THAT IT SHALL NOT TAKE EFFECT UNTIL PAYMENT OF PREMIUM.

A provision of a policy of life insurance clearly stating that, although delivered, it should not take effect until the first premium had been paid, is valid and enforceable, at least to the extent of requiring that the holder should have paid, or obligated himself to pay, the first premium in full before the policy would attach.[1]

2. SAME.

A policy of life insurance contained a provision that possession of it by the insured should not render it valid unless premium thereon had actually been paid in cash. Such policy was issued on an application made through an agent of the company who was allowed by custom to retain his commission from the first premium. The agent delivered the policy to the applicant, and himself remitted to the company the portion of the first premium in excess of his commission, taking a note from the applicant for an amount equal to about two-thirds of the entire premium. The company, in the belief that the premium had been fully paid in cash, credited the same to the policy holder, but, on learning the facts after his death, and while the note was wholly unpaid, at once repudiated the transaction and refused payment of the policy. The evidence showed that it was understood between the agent and the applicant that the note of the latter covered all he should be required to pay on account of the first premium, but the agent had no authority from the company, either express or by virtue of his agency, to accept less than full payment in cash. *Held*, that aside from the question whether, under its terms, the policy would have become effective had the note been for the full amount of the premium, it did not attach in the absence of proof that the holder had either paid, or agreed to pay, in some manner, such premium in full.

In Error to the Circuit Court of the United States for the District of Massachusetts.

Victor J. Loring (Barron C. Moulton and George Burnham, Jr., on the briefs), for plaintiff in error.

James R. Dunbar (John O. Teele, on the briefs), for defendant in error.

Before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge.

PUTNAM, Circuit Judge. The labor put on the court in examining this case, and its liability to oversight, have been much increased by the disregard of our rule requiring that, on every reference to the record, briefs shall state the page to which the reference is made.

This is a suit on an insurance policy obtained by George W. Simmons on his own life, payable to the plaintiff below. The defendant below is a New York state corporation. The policy is dated on November 13, 1897, and it was issued on an application made at Boston

[1]Commencement of insurance risk, see note to Insurance Co. v. Phillips, 41 C. C. A. 273.

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on October 30th, and signed by Simmons. He died on February 22, 1898. The substantial question is whether the policy attached. The verdict and judgment in the court below were for the plaintiff below. At the close of all the evidence the defendant below requested the court to direct a verdict for it, which request was refused, and an exception taken thereto. It is not necessary to consider any other question than whether the court should have granted this request.

The negotiations were made through Homer E. White, an agent at Boston of the defendant corporation. There is nothing in the case showing that the corporation had such relations, either to the state of Massachusetts or to White as its agent, as to give White any peculiar powers beyond those which it specifically conferred on him. In this respect the case is unlike Insurance Co. v. Chamberlain, 132 U. S. 304, 10 Sup. Ct. 87, 33 L. Ed. 341. The only authority conferred on White is found in the written agreement with him which makes a part of the record. All the connection which he properly had with the transaction, so far as the defendant corporation was concerned, was to obtain the application and forward it, receive back the policy, deliver it to George W. Simmons, and take payment of the first premium, and, on payment being made, to deliver Simmons the proper receipt for the same.

The policy was thus delivered to Simmons soon after November 12, 1897, on which date it was mailed by the defendant corporation to White. Simmons never obtained a receipt for the payment of any premium, and never, in fact, paid any money for the policy, nor anything except the promissory note to which we will refer later. The application contained, among other things, the following:

"Under no circumstances shall the insurance hereby applied for be in force until payment in cash of the first premium, while the applicant is in good health, and delivery of the policy to the applicant in person, during his lifetime and while in good health."

The policy contains on its face a notice in striking type that possession of it by the insured does not render it valid "unless premium thereon has actually been paid in cash." This throws light on all questions of fair dealing and good faith. The policy does not acknowledge the receipt of any premium, and it refers to the application as a consideration for its issue. The face of the policy makes it subject to the provisions stated on its second page, among which are the following:

"This contract shall not take effect until this policy is delivered to the member in person, during his lifetime and while in good health, nor until the first premium is paid in cash hereon while said member is also in good health. No contract, alteration, or discharge of contracts, waiver of forfeitures, nor granting of permits or credits, shall be valid unless the same shall be in writing, signed by the president or vice president and one other officer of the association."

"Each premium is due and payable at the home office of the association in the city of New York, but may be accepted elsewhere by a duly-authorized local treasurer in exchange for the association's official receipt signed by its president, secretary, or treasurer; and no premium on this policy shall be considered as paid unless such a receipt shall be given therefor, which receipt is the sole evidence of the authority of any person to receive any premium on account of this policy."

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The evident expectation of the corporation was that delivery of the policy did not complete the contract, and that the payment of the first premium in cash was necessary for its completion. No presumption of payment of the premium arose from the delivery of the policy to Simmons. Indeed, at the close of the judge's charge, the plaintiff below stated that she did not claim that the possession of the policy was any evidence of such payment.

The full effect of the stipulation on the second page of the policy, that no premium shall be considered as paid to an agent unless a special receipt shall be given therefor, need not be determined for the present case. It might be regarded as an extreme proposition to hold that in all aspects there could be an effective stipulation that payment should be proved only in a particular way; but all we need now say is that it may not be such to hold that an insurance corporation is justified in insisting that an applicant for insurance shall come to an understanding with it that, when dealing through an agent, there shall be no opportunity for disputes to arise, as they do in the case at bar, whether a policy has become effective.

By the terms of White's employment, he was entitled to retain for his own compensation 65 per cent. of the first premium, the premium amounting to $436.50. It is shown that it was the practice of this corporation to permit agents to retain the 65 per cent., remitting it only the 35 per cent. which was ultimately due it, with a report that the whole premium had been received. There is, however, no evidence that the corporation ever assented to its agent White, or to any other agent, receiving payment of any portion of any premium except in cash, or a part of a premium in lieu of the whole, and there is no evidence that there was any practice or custom accordingly. White delivered the policy to George W. Simmons, and remitted 35 per cent. of the first premium in cash in two installments,—the first, $84.82, and the second, $67.95. Thereupon the corporation, on February 2, 1898, forwarded White the receipt referred to in the conditions of the policy which we have cited; but, as we have already said, the receipt was never delivered to Simmons. It also appears that on the 2d day of February, having received its 35 per cent., the corporation credited the premium on its books as fully paid, to wit, in the sum of $436.50, and charged White with the 65 per cent., the portion coming to him. There is no evidence that, at the time these entries were made, the corporation knew, or had any information, that White had not received cash payment of the whole premium, as stipulated in the conditions of the policy. Therefore this transaction did not amount to waiver or estoppel so far as the corporation is concerned.

Immediately after the death of George W. Simmons the defendant corporation learned the facts with reference to the nonpayment of the premium by him in cash, and canceled the transaction so far as it could cancel it. This is of no consequence, except that it relieves it from the presumption which would have arisen against it if it had remained quiescent after being informed of what had occurred.

The plaintiff below had sufficient evidence to go to the jury on a claim that George W. Simmons had arranged with White to advance

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the corporation on his (Simmons') account, in cash, the 35 per cent. which would ultimately come to it. Under ordinary circumstances, and aside from the peculiar stipulations of the policy in suit, this remittance by White, in connection with an arrangement between him and George W. Simmons as to the balance, if one had been made, might have satisfied the first premium.

There was put in evidence by the plaintiff below a letter from George W. Simmons to White, dated on January 24, 1898. This was produced by White on his cross-examination. It is not questioned that Simmons' understanding of the arrangement as stated in the letter was never repudiated by White. Therefore, the letter became a part of the res gestæ. It enclosed a note from Simmons to White for $296.20, which it said covered $228.25, and also $67.95, erroneously printed "$69.95," which latter it stated had been paid by White for Simmons in cash. This, we have said, was the last installment remitted by White. His cross-examination by the plaintiff below assumed that there was an agreement between him and Simmons for a fraud on the corporation in the matter of the first premium. It computed the note as follows: It took one-half of the premium,—that is to say, $218.25,—added to it $5 for the doctor's certificate and $5 for the policy, making $228.25, and to this added $67.95, leaving $296.20, the precise sum of the note. Simmons and White had understood that the corporation had this sum of $67.95 to the credit of Simmons, which, with White's first remittance of $84.82, would have completed the 35 per cent. coming ultimately to it. This proved to be erroneous, and therefore this $67.95 was remitted to the corporation by White on the precise day on which Simmons' letter bears date. The $84.82 must have been a part of the $218.25 which went to make up the note, leaving White only $133.43 for his commission, and half of the first premium unprovided for except to the extent of the $67.95. Prior to the discovery that the $67.95 was not to the credit of Simmons with the corporation, it was undoubtedly his intention to give a note for only $228.25, and his including the $67.95 was apparently an afterthought, arising from the fact that the amount was not to his credit, as had been supposed. However this may have been, he wrote as follows:

"This note for $296.20 includes the $228.25 and $67.95 which you say you paid for me in cash, as it is not convenient for me to make payment at present in any other way, and I had not understood it was to be paid in any other way. Would like a receipt showing the transaction in detail from the office, as I have nothing on paper at present to show the exact adjustment."

There is much in White's testimony of a general character to the effect that Simmons agreed to pay the full premium, but the cross-examination to which we have referred, and the terms of this letter, show that this note was intended by Simmons to be the final adjustment between him and White; and White's retention of the letter, without repudiation, leaves him as assenting to the position taken by Simmons. Indeed, these facts are so persuasive as to leave no reasonable ground for maintaining that Simmons intended to pay, much less ever did pay, either directly to the corporation or indi-

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rectly through White, anything more than this sum of $296.20 for the first premium called for by the policy. Therefore, not only is there no evidence that Simmons ever paid any part of the premium in cash, as called for by the letter of the policy, but this note is the only payment in any form made by him, or intended to be made by him, on a fair construction of the record.

If the delivery of the policy had afforded prima facie evidence of the payment of the premium, or if George W. Simmons, at his death, had been in possession of the special receipt to which the defendant corporation has given so much importance, the record would, of course, have shown sufficient to have thrown on the defendant below the burden of proving that the policy never attached for want of such payment. But, as we have said, as the record stands, there is no evidence that the defendant corporation ever waived the conditions that the premium should be paid in cash, and that the policy should not become operative until a receipt in the form provided by the policy had authenticated the payment; and much more is there none that it ever waived the payment of the entire premium to somebody. In Insurance Co. v. Unsell, 144 U. S. 439, 449, 12 Sup. Ct. 671, 36 L. Ed. 496, the court reaffirmed its well-settled rule that any agreement, declaration, or course of action on the part of an insurance company, which leads the party insured honestly to believe that by conforming thereto a forfeiture of his policy would not be incurred, followed by due conformity on his part, estops the company from insisting on a forfeiture; but in the present case, as we have seen, what was proved went only to the extent of relieving the agent from remitting the portion of the premium which ultimately belonged to him. There was no waiver or estoppel beyond that.

The receipt, as we have said, lay, at the time of Simmons' death, in the hands of the agent White. White left the transaction in its incomplete state in order, presumably, to secure the ultimate payment of what he had advanced to the corporation, thus holding the case in that doubtful condition in which, as we have said, the defendant corporation might fairly insist that the delivery of the receipt was a prerequisite to the completion of the contract.

In Carpenter v. Insurance Co., 16 Pet. 495, 511, 512, 10 L. Ed. 1044, the supreme court not only held that questions of the character involved here are not determined by local decisions, but also gave complete effect to stipulations in insurance policies prohibiting their modification except in the precise manner which the stipulations provide. Klein v. Insurance Co., 104 U. S. 88, 91, 26 L. Ed. 662, lays down the rule which the supreme court has always maintained,—that with reference to life policies the insurers are entitled to insist on prompt payment of premiums, and that the court will not relieve from forfeiture for nonpayment,—though this, of course, does not impugn its various decisions where it found that the insurer, by its course of conduct, had waived prompt payment or had induced the insured to understand that it was waived. Hoffman v. Insurance Co., 92 U. S. 161, 23 L. Ed. 539, is, in some substantial aspects, like the case at bar. The opinion, at page 164, 92 U. S., and page 541, 23 L. Ed., said:

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"Life insurance is a cash business. Its disbursements are all in money, and its receipts must necessarily be in the same medium. This is the universal usage and rule of all such companies."

In that case the agent who negotiated the policy received the premium in various items, none of which were cash, and gave a receipt for it, in that way putting himself between the insured and the insurance company. But the court said, at page 165, 92 U. S., and page 541, 23 L. Ed., that the exercise of such a power by the agent was liable to two objections,—that it was ultra vires and that it was a fraud as respects the company. The opinion contained other lines of reasoning, growing out of the fact that the agent received a horse in part payment; but the references we have made apply directly to the case at bar.

Nothing would be gained by undertaking to follow through and sift out the decisions of the state tribunals with reference to the questions here involved. How conflicting, and, indeed, how absolutely irreconcilable, they are, will be at once apparent on examining the citations made in May, Ins. (4th Ed. 1900) §§ 137, 137A, 345–345H, and 360–360G, including the notes thereto. It is of advantage, however, to refer especially to the following decisions:

Brown v. Insurance Co., 59 N. H. 298, and Dunham v. Morse, 158 Mass. 132, 32 N. E. 1116, cover cases each of which is substantially like that at bar. If either of those decisions had come from the supreme court, instead of from state tribunals, it would have been broadly in favor of the defendant corporation. So, in Conway v. Insurance Co., 140 N. Y. 79, 35 N. E. 420, decided in 1893 in the state which was the locus of the alleged contract in suit, the insured had given his note to the agent for the premium, but did not pay it during his lifetime, although it had become due. The agent meanwhile retained the renewal receipt. In all substantial respects, except the fact that the present policy required that payment should be made in cash, the case was like the one at bar. The court held that there could be no recovery on the policy.

In addition to the above, we may well refer to chapter 522, § 68, of the Acts of Massachusetts of 1894, as follows:

"No life insurance company doing business in Massachusetts shall make or permit any distinction or discrimination in favor of individuals between insurants of the same class and equal expectation of life in the amount or payment of premiums or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of the contracts it makes; nor shall any such company or any agent thereof make any contract of insurance, or agreement as to such contract, other than is plainly expressed in the policy issued thereon; nor shall any such company or agent pay or allow, or offer to pay or allow, as inducement to insurance, any rebate of premium payable on the policy, or any special favor or advantage in the dividends or other benefit to accrue thereon, or any valuable consideration or inducement whatever not specified in the policy contract of insurance."

Section 98 subjects violations of section 68 to criminal penalties. This statute may not apply directly to this policy, because it was made in New York; but section 82 would apply to this corporation in such way as to shut it out from the transaction of business in Massachusetts, if shown to have persistently violated the act. For

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it to permit its agents to do in that state what, in any view, the agent in this case undertook to do, would be a clear violation; and therefore, in addition to its legal right to insist on stipulations plainly made between it and the insured, the statute illustrates that the courts ought to aid it in so doing, and that the provisions in its policy on which it relies are not unreasonable, but are necessary for its protection. Aside from any statutory regulations, a life insurance corporation has a direct interest in maintaining the solvency of its agents, through whom large sums are often transmitted to or from it. It has, therefore, a direct interest in prohibiting them from involving themselves by incautious credits for amounts for which they (the agents) are holden responsible in cash, and from loading themselves with unavailable assets with reference to any sums for which they must account.

We have expressed our present impressions as to various questions which the parties seem to regard as involved in the case, and which might arise again on a new trial; but inasmuch as their application might be modified, more or less, on a new state of facts which a new trial might bring before us, and as it is not now necessary to decide whether, on the peculiar terms of this policy, a credit given by the agent to an applicant for insurance of the amount of the agent's portion of the first premium, and corresponding entries on the books of the insurer, made in ignorance of the credit, would cause the policy to attach, we have concluded that it is safer to rest our present determination on the simple fact that, whatever was the arrangement between George W. Simmons and White, the record fails to show that anybody ever paid, or agreed to pay, the entire premium called for by the policy, either in cash or otherwise; so that, independently of any question whether the provision cited, requiring payment in cash, would reach the 65 per cent. to be retained by White, and independently of all propositions relating to the special receipt prescribed on payment to an agent, the policy never attached.

The judgment of the circuit court is reversed, the verdict is set aside, the case is remanded to that court for further proceedings in accordance with law, and the plaintiff in error recovers its costs in this court.

(107 Fed. 429.)

In re NEWTON.

(Circuit Court of Appeals, Eighth Circuit. February 25, 1901.)

No. 19.

1. BANKRUPTCY—REOPENING OF ESTATE—APPOINTMENT OF NEW TRUSTEE.

Where it is desired to reopen the estate of a bankrupt after it has been closed and the trustee discharged, the first step is properly the making of an order for that purpose, and it then devolves upon the creditors, under Bankr. Act 1898, § 44, to appoint a new trustee. The court has no authority to make such appointment unless the creditors fail to do so.

2. SAME—SHOWING TO WARRANT REOPENING OF ESTATE.

To authorize the court to reopen the estate of a bankrupt, under Bankr. Act 1898, § 2, subd. 8, it should "appear" by some satisfactory evidence

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that there are assets unadministered, although no formal or technical procedure is required. An unverified petition filed by a creditor, stating on information and belief that the wife of the bankrupt has "money or property" belonging to him, without stating its character or amount, and which is unsupported by affidavits or other evidence, is insufficient to warrant any action by the court.

Petition for Revision of Proceedings of the District Court of the United States for the Western Division of the Western District of Missouri.

Francis A. Leach, George W. Day, and T. C. Sparks, for petitioner.
James W. Garner, for respondent.

Before CALDWELL and SANBORN, Circuit Judges, and ADAMS, District Judge.

ADAMS, District Judge. This is an original proceeding instituted in this court to revise the action of the district court of the United States for the Western division of the Western district of Missouri in refusing to appoint a trustee in bankruptcy to administer certain assets alleged to have been discovered by the petitioner, Arthur G. Newton, after the first trustee had rendered his final accounts and had been discharged. The facts of the case, so far as it is now necessary to state them, are as follows: On November 9, 1899, one William E. Evans was, on his own petition, adjudicated a bankrupt. On December 2, 1899, after due notice, the first meeting of creditors was held, and John R. Walker duly appointed trustee of the bankrupt's estate. On December 8, 1899, the trustee submitted his final report, showing no assets. On the same day the report was approved, and the trustee discharged. On January 8, 1900, after due notice to creditors, the bankrupt's application for a discharge from his debts was granted by the court. On February 23, 1900, the petitioner, Arthur G. Newton, filed his proof of claim against the bankrupt's estate in the sum of $794, and on March 28, 1900, filed a petition in the district court setting forth the foregoing facts, and in addition thereto as follows:

"That your petitioner is informed and believes, and so alleges, that said William E. Evans has money or property which he did not include in his schedule of assets, and which may in proper proceedings be made available in the payment of his debts; that the money or property aforesaid is now held by ——— Evans, the wife of said William E. Evans, in trust to the sole use, benefit, and behoof of the said William E. Evans, and was so held at the time of filing of said petition in bankruptcy, as aforesaid, in fraud of the creditors of the said William E. Evans. Wherefore your petitioner prays that an order be made appointing some suitable person trustee herein, to the end that all assets of said bankrupt may be administered and dealt with according to the law in such cases made and provided.

"[Signed] Leach, Day & Sparks, Attorneys for Petitioner."

This petition was not verified or otherwise supported by affidavits, but was submitted on its own showing, and on July 14, 1900, was overruled by the court.

The bankruptcy act, approved July 1, 1898, contemplates that an application for a discharge may be filed and acted upon before the estate is fully administered. Section 14 of the act provides that

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such application may be made within one month after the adjudication. Section 57, subd. n, gives creditors one year after the adjudication within which to file their proofs of claim. The act also contemplates the reopening of an estate after it has once been closed. Section 2, subd. 8, provides that courts of bankruptcy may "close estates whenever it appears that they have been fully administered by approving the final accounts and discharging the trustees, and reopen them whenever it appears they were closed before being fully administered." Section 11, subd. d, gives a trustee two years after an estate has been closed to institute suit for the recovery of assets. These and other provisions of the act which might be referred to plainly show that notwithstanding a bankrupt may have been discharged from his debts, and notwithstanding a trustee may have filed his final accounts and been discharged from his trust, and the estate be thereby closed, it may nevertheless be opened again if unadministered assets be discovered.

While it is the duty of the court and the clear policy of the bankruptcy act to require trustees "to close up the estate as expeditiously as is compatible with the best interests of the parties in interest" (section 47, subd. a), it is equally the duty of the court to reopen the estate whenever it satisfactorily appears that there are assets of the bankrupt which have not been administered. When such a showing is made to the court as justifies an order for reopening the estate, such order should be made by the court as a first step towards the further administration of the bankrupt's estate. After such order is made, section 44 of the act contains provisions for further proceedings. This section provides that "the creditors of a bankrupt estate shall at their first meeting after the adjudication, or after the vacancy has occurred in the office of the trustee, or after the estate has been reopened, * * * appoint one trustee or three trustees of such estate. If the creditors do not appoint a trustee as herein provided the court shall do so." This section, in our opinion, confers upon the creditors of the estate the same authority and power with respect to the appointment of a trustee, after an estate once closed has been, by order of court, reopened, as is conferred upon them at the first meeting held after the adjudication. It confers upon the creditors, as the parties chiefly interested, the right in either case to select their own trustee. When they fail to do so, either at the first meeting, or afterwards, in case of a reopening of the estate, and not till then, power is conferred upon the court to make such appointment.

The prayer of the petition in this case is that the court make an order appointing some suitable person trustee herein. As it nowhere appears that there had been any previous order of the court to reopen the estate of the bankrupt, or that the creditors had failed to elect a trustee, it is clear that the district court had no right or authority to grant the prayer of the petition to appoint a trustee. Such authority was vested in the creditors, and, until they failed to exercise it at a meeting duly called for that purpose, the court had no authority to do so. The motion, therefore, was properly denied by the district court.

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But if the petition of Newton could be regarded as a motion to reopen the estate preparatory to a reference for further administration, it is, in our opinion, too indefinite and uncertain to move the court to open up the case. To sustain such a motion, the court must be reasonably satisfied; in other words, according to the provisions of the bankrupt act, it must be made to appear to the court that there are unadministered assets.

As already seen, the only information given to the court by the petition is an unverified statement made by petitioner's attorneys that the petitioner is informed and believes that the wife of the bankrupt held "some money or property" in trust for the bankrupt. Whether it is money or property, and how much of either,—whether $1 or $5,000 in value,—the petitioner is not made even to venture a belief. This petition might be reinforced by supporting affidavits, but no such are found in the record.

We do not wish to be understood as holding that the petition to reopen an estate once closed must be of any formal or technical character. Such is not necessary, and in the practical administration of the bankruptcy act is not advisable, but such petition must be either in itself, or in connection with supporting affidavits, of such persuasive character as to reasonably satisfy the court of the requisite jurisdictional fact, namely, that there are some assets belonging to the bankrupt which have not been administered. We are of opinion that the petition in this case, if treated as a proceeding to reopen the estate, was vitally defective, in that it failed to state any substantial or definite facts from which the court could reasonably find that there were any assets to be administered. The conclusions reached in this case can work no injustice, as the petitioner has ample time within which to renew his effort to reopen the estate, provided he can make the requisite showing. It results that the action of the trial court in denying the petition for the appointment of a trustee was correct, and the same is approved and confirmed.

(107 Fed. 434.)

UNITED STATES v. CHEVALLIER.

(Circuit Court of Appeals, Ninth Circuit. February 4, 1901.)

No. 633.

INTERNAL REVENUE—WHOLESALE LIQUOR DEALER—BRANCH HOUSE—TAXATION AS SEPARATE BUSINESS.

Defendant, a wholesale liquor dealer in San Francisco, maintained a branch house in Portland, bearing his sign, and where presumably samples of his trade were kept, and where the public were invited to purchase. The manager thereof was a "salesman" who was required to sell judiciously, the right to cancel his contracts being reserved to his principal, who filled all orders, and, without prepaying the freight, delivered the goods to a carrier at San Francisco, consigned to purchasers in various parts of the agent's territory. *Held*, that the sales were made wholly at San Francisco, notwithstanding the agent may have been authorized to make binding contracts and collected the purchase money,

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and defendant was not subject, under Rev. St. § 3244, subd. 4, to the internal revenue tax, as an Oregon liquor dealer, though his method of transacting business may have been devised purposely to evade such tax.

In Error to the Circuit Court of the United States for the District of Oregon.

It is sought by the writ of error in this case to review the judgment of the circuit court (102 Fed. 125) in an action instituted by the United States against George F. Chevallier, doing business under the firm name of F. Chevallier & Co., to recover special revenue tax as both wholesale and retail liquor dealer, which business it was alleged was carried on in the city of Portland, in Oregon, in violation of subdivision 4 of section 3244 of the Revised Statutes. The defendant in error, by his answer, denied that he was carrying on the business of either retail or wholesale dealer in liquors within the state of Oregon, and set out, in a further and separate answer, that he was carrying on the business of wholesale and retail liquor dealer in San Francisco, state of California, and had paid a special tax therefor; that he had a branch office in the city of Portland, over the door of which was painted the sign, "F. Chevallier & Co., W. H. Fiske, Manager," where he kept no wines or liquors for sale, but where his agent received conditional orders for wines and liquors, and forwarded the same to the defendant's house in San Francisco, there to be approved and filled, and that upon such approval by the defendant the goods ordered were shipped from the San Francisco house directly to the purchaser in Oregon or elsewhere at the risk of the purchaser; that the said Fiske, as manager, had no authority from the defendant to make any sale of or offer for sale any wines or liquors in the city of Portland or elsewhere in the district of Oregon; that all such sales were completed and made in the state of California. The answer admitted that the said agent received as his compensation for such services a commission on the amount of sales made by the defendant in San Francisco upon such orders, and was authorized to receive from the defendant's customers in Oregon in certain instances the purchase price of wines and liquors so sold, and in some cases did receive such purchase price, and accounted for and forwarded the same to the defendant in San Francisco, and that the agent kept an account of all moneys so received and disbursed by him, and a duplicate copy of the record of such sales made by the defendant in San Francisco, and that for that purpose defendant employed a clerk to aid the agent at his office at Portland, Or. This answer was demurred to upon the ground that the matters pleaded and set forth therein are insufficient to constitute a defense to the complaint, and on the submission of the demurrer it was agreed that the agreement between the defendant and his agent, under which the agency was conducted, might be considered by the court as if it were set forth in the answer. The agreement contains, among others, the following provision: "That, in order to better carry on their business in the states of Oregon, Washington, Idaho, and Montana, the first parties hereby employ the second party in the double capacity of salesman and manager of the office which the first parties will maintain within the territory just mentioned. As salesman, the second party agrees to sell for the first parties judiciously, and to the best of his ability, any and all articles in their line of which the first parties may furnish him a list, at prices and on terms to be specified by them, and over any and all such territory as is included in the states of Oregon, Idaho, Washington, and Montana. The second party shall submit all orders to the judgment of the first parties, and shall abide by their decisions regarding the propriety of filling or rejecting any or all such orders. He shall also use due diligence in forwarding the interests of the first parties, making trips or traveling over the described territory as often as the first parties may consider necessary for the welfare of the business." The agreement makes further provision concerning the management of the business, employment of clerks, repair of fixtures and office furniture, and contains the following: "The first parties will allow the second party a gross commission of 24% on all bona fide sales of such merchandise as they carry regularly in stock, effected within the described territory."

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John H. Hall, U. S. Atty.

Mitchell & Tanner, E. Mendenhall, and Riordan & Lande, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Since the contract was offered to the court as part of the defendant's defense, and for the purpose of showing the exact nature of his dealings with his agent, the averments of the answer may be construed with reference to it, and consideration of the demurrer may be confined to the facts which are disclosed by the contract, aided by such portions of the answer as are necessary to explain its meaning. Briefly, then, the facts disclosed in defense of the action are that the defendant in error maintained a branch house in Oregon, a place which bore his sign, and where presumably samples of his wines and liquors were kept, and where the public were invited to purchase. The manager at Portland was a "salesman." He was authorized to sell, and he was required to sell, judiciously, but the right to cancel his contracts was reserved to the defendant in error, who filled all orders, and delivered the ordered goods to a carrier at San Francisco, and consigned them to the purchasers in Oregon. Under this state of facts, were the liquors sold or offered for sale in Oregon, or were they sold and offered for sale in San Francisco? It may be conceded that in selling specific goods the place of sale is the place where a binding contract for their disposal is entered into, although the property itself may be situated elsewhere. But the sales in this instance were not sales of specific articles. They were sales of goods carried in stock. No sale was or could be complete until the goods were separated from the goods in stock and delivered to the carrier. This was the last act to consummate the sales, and it was done in San Francisco. When the goods were thus segregated and placed in charge of the carrier, to be transported to the purchasers, the right of the vendor over them ceased, and that of the purchaser began. It is immaterial, therefore, whether the authority of the agent in Portland was limited to the power to receive and transmit orders, or was broad enough to include the power to make a binding contract of sale. Nor is it material that he collected the purchase money on sales so made. In Abberger v. Marrin, 102 Mass. 70, the court said: "As between vendor and vendee, title to specific personal property passes by the contract of sale. But, where the sale is of goods generally, no property in them passes till delivery, because until then the very goods sold are not ascertained." It is true that in Taylor v. Pickett, 52 Iowa, 467, 3 N. W. 514, it was held that where an agent sells liquors, and sends to his principal a statement of the sale, for the latter to fill by forwarding to the purchaser the liquors specified, the sale is made where the agent resides; but we find no support elsewhere for that doctrine. The current of authority is that, even in a case where the sale is made by the owner of the goods in person at a place other than that in which the goods are situated, the sale is not completed

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until the property is actually separated from the stock in the store, and delivered to the carrier, and that the place of such delivery is the place of sale. Dolan v. Green, 110 Mass. 322; Abberger v. Marrin, 102 Mass. 70; Webber v. Howe, 36 Mich. 150; Sortwell v. Hughes, 1 Curt. 244, Fed. Cas. No. 13,177. See, also, Garbracht v. Com., 96 Pa. 449; Woolsey v. Bailey, 27 N. H. 217; Sarbecker v. State, 65 Wis. 171, 26 N. W. 541; Gross v. Scarr, 71 Iowa, 656, 33 N. W. 223. A different case would have been presented if it had been shown that instead of sending the goods to the purchasers by a common carrier, the freight to be paid by the purchasers, the vendor had paid the freight charges, or had sent the goods by express, to be paid for on delivery from the express company, or had consigned them to his agent, to be by him delivered to the purchasers. Weil v. Golden, 141 Mass. 364, 6 N. E. 229; State v. O'Neil, 58 Vt. 140, 2 Atl. 586; U. S. v. Shriver (D. C.) 23 Fed. 134; U. S. v. Cline (D. C.) 26 Fed. 515; Com. v. Eggleston, 128 Mass. 408; Com. v. Shurn, 145 Mass. 150, 13 N. E. 395.

Nor do we think that the defendant by maintaining his office at Portland under the contract has there "offered" wines and liquors for sale, within the meaning of the statute. Goods are offered for sale at the place where they are kept for sale and where a sale may be effected. They are not offered for sale elsewhere, by sending abroad an agent with samples or by establishing an office for the purpose of taking orders. It must be held that the offer to sell in this case is an offer to sell at the place where sales are in fact made, and at the only place where they are made, which is in San Francisco. It may be true, as suggested by counsel for the plaintiff in error, that the method of transacting the business of the defendant in error in Oregon has been devised with the view of evading the payment of the special tax, and that by establishing his branch office in Portland he there enters into competition with wholesale dealers who are required to pay the special tax, and that thereby the revenues which otherwise would accrue to the government are diminished. These considerations suggest, perhaps, reasons why the statute should be altered to meet such a case as is here presented. We find no remedy for it in the plain intendment of the existing statute. The judgment of the circuit court will be affirmed.

(106 Fed. 672.)

NICHOLS v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. January 24, 1901.)

No. 1,412.

1. INTERNAL REVENUE—STAMP TAX—FOREIGN CIGARS ADMITTED FREE OF DUTY.
Under the regulations of the treasury department permitting a passenger entering the United States to bring in free of duty, as personal effects, not exceeding 50 cigars, Mexican cigars so brought into this country by passengers or travelers are not subject to internal revenue tax; and one to whom such cigars have been given may retain the same in his posses-

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sion unstamped, or may give them away, without being subject to the penalty imposed by Rev. St. § 3397, on every person "who buys, receives or has in his possession any cigars on which the tax to which they are liable has not been paid."

2. CRIMINAL LAW—SENTENCE—POWER OF COURT TO REVISE.

The mere announcement of the sentence imposed on a defendant who has been convicted of a criminal offense does not preclude the court from reconsidering such sentence, and imposing a heavier one, before the sentence announced has been entered of record, and while the defendant is still within the bar; nor can it be presumed that the sentence was increased because of a statement by defendant's counsel of his intention to appeal, made after the first sentence was announced.[1]

In Error to the District Court of the United States for the Eastern District of Missouri.

W. H. Clopton, for plaintiff in error.

Edward A. Rozier, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. Samuel C. Nichols, the plaintiff in error, hereafter designated as the "defendant," was indicted by the grand jury of the United States for the Eastern division of the Eastern district of Missouri for alleged violations of the internal revenue law. The indictment contained four counts, but the jury found the defendant guilty on the third count only; and the district attorney entered a nolle prosequi as to the other counts, which will not be further mentioned. The defendant entered a plea of not guilty. The case was tried before Judge Philips, who had been duly assigned to hold the court in the Eastern district of Missouri in the absence of Judge Adams. Upon the verdict of the jury finding the defendant guilty on the third count of the indictment, the court pronounced sentence and judgment, and thereupon the defendant removed the case into this court by writ of error.

It is stated in the brief of the district attorney that the third count of the indictment on which the defendant was convicted "was not drafted under section 3404, but under section 3397," of the Revised Statutes of the United States, and he relies upon that section to support the indictment and the judgment below. On the other hand, counsel for the defendant contends that the indictment does not charge an offense under section 3397, but must rest for its support on section 3404. The count charges that the defendant "unlawfully did purchase and receive for sale and have in his possession one thousand cigars on which the internal revenue tax of the United States then by law imposed upon cigars had not been paid." The only clause of section 3397 to which the count can be referred is the one inflicting a penalty on every person "who buys, receives, or has in his possession any cigars on which the tax to which they are liable has not been paid." Section 3404 reads as follows: "Every person who purchases or receives for sale any cigars which have not been branded or stamped according to law, shall be liable to a penalty of fifty dollars for each such offense." It will be observed that the count does not follow the

[1] See note at end of case.

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language of either section. The acquisition of the cigars "for sale" is not essential to constitute the offense under section 3397; and, if the count is to be referred to the clause of this section we have quoted, the words "for sale" are surplusage, and all evidence of the sale of cigars was irrelevant. The count varies still more widely from the offense defined by section 3404, for under that section the offense consists in purchasing or receiving "for sale any cigars which have not been branded or stamped according to law." That the pleader did not intend to locate count 3 on this section is manifest from the fact that count 4, which was nol. pros'd, followed exactly the language of this section, and charged that the defendant "did purchase and receive for sale one thousand cigars which had not been then and there branded and stamped as provided" by law. It is conceded that the judgment below cannot be supported if the count is to be referred to section 3404, for the penalty for violating that section is a fine of $50 only, whereas the court imposed a fine of $100, and 12 months' imprisonment. Upon the whole, we think the count charges an offense under section 3397, and that the words "for sale" must be treated as surplusage.

A brief reference to the testimony is essential to an intelligent understanding of the exceptions:

The testimony on behalf of the government tended to show: That the defendant, John Graham, and Charles James owned and ran a restaurant near the depot of the St. Louis, Iron Mountain & Southern Railway, at Poplar Bluff, Mo. That on the 2d of November, 1897, the witness West, a detective, went into this restaurant and asked for Mexican cigars, and a person behind the counter, whom he did not know, handed him a box, partly filled, containing 22 Mexican cigars, which he bought. The box was taken from underneath the counter on which the cigar case rested. That later in the day he went into the eating house and asked for a Mexican cigar, and the defendant was then behind the counter, and sold him two cigars which he said were made in the Mexican republic. And that the box from which the cigars were taken had no United States internal revenue stamp on it. A special agent of the treasury department testified that he searched the restaurant and found under the counter two boxes containing Mexican cigars,—one containing 20, and the other a less number,—and that he also searched the lodging apartment occupied by the defendant, James, and Graham, and found in Graham's trunk a box partly filled with Mexican cigars, and a box containing one large cigar, and that the United States internal revenue stamp was not on any of the boxes.

On behalf of the defendant it was shown by the testimony of the special agent of the treasury department, and the regulations of the treasury department, that passengers and travelers coming from Mexico into the United States were permitted to retain 50 cigars without payment of duty. The following is a copy of the regulations:

"(6841)—Free Entry—Cigars in Passenger's Baggage.

"Treasury Department, April 3rd, 1885.

"Sir: I am in receipt of your letter of the 30th ulto., requesting to be informed as to what quantity of cigars found in a passenger's baggage shall be

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delivered free of duty. It is decided, in accordance with your recommendation, that any cigars in excess of fifty in the baggage of any one passenger shall be subject to duties, as the case may require. Please give instructions accordingly.

"Very respectfully, C. S. Fairchild, Acting Sec'y.

"Collector of Customs, New York."

"(9119)—Synopsis of Decisions Treasury Department, 1888—Free Entry—Cigars in Passenger's Baggage at Ports on the Frontier.

"Treasury Department, November 17th, 1888.

"Sir: The department is in receipt of your letter of the 30th ulto., reporting in the matter of the complaint of Louis J. Wortham, special inspector, that there is too much liberty at the subport of Laredo in the admission free of duty of single boxes of cigars imported from Mexico. It would appear from your report that your instructions to inspecting officers at the several crossings of the Rio Grande river and on the railroad tracks were founded upon department decisions of April 3rd, 1885, Synopsis 6841, and were to the effect that no resident of the Rio Grande Valley should be allowed to pass any cigars free, but that bona fide (passengers) and travelers should be permitted to retain fifty cigars without payment of duty. You state that you believe these orders have been strictly obeyed, but that notwithstanding the same a great many boxes of cigars are imported each month under the privilege aforesaid, and still larger number in the pockets of persons who cross and recross daily, and who bring from one-half to two dozen cigars in their pockets each trip. You desire to know whether you should search each man in order to stop this illegal traffic. In reply you are informed that sec. 3081, Rev. Statutes, gives ample authority to search any person on whom the custom's officers suspect there is merchandise subject to duty, or which has been introduced into the United States in any manner contrary to law. Respecting the importation of cigars, the department does not deem it expedient at this time to modify Synopsis 6841, except that the privilege thereby extended to travelers and passengers should be restricted to bona fide passengers and travelers passing through the frontier towns say once, or at the most twice, a year, and that persons residing at or near the frontier should not be considered as (passengers) or travelers, within the meaning of the decisions cited.

"Respectfully, yours, I. H. Maynard, Assistant Secretary.

"Collector of Customs, Corpus Christi, Texas."

The defendant testified that for several years prior to the transaction in question he had been, and was then, in the employ of the St. Louis, Iron Mountain & Southern Railway Company as baggage master, and that his stated run was between Texarkana, Ark., and Poplar Bluff, Mo.; that during his employment and runs he met many employés of the railroads, and that these men, in passing through Poplar Bluff, would come to the restaurant at Poplar Bluff owned by him, Graham, and James, out of money, and he would furnish them something to eat, and they would give him Mexican cigars; that he was in Poplar Bluff every third day, and on arriving there he would get his meals at the restaurant, and that he occupied for his private sleeping quarters the lodging room in connection with Graham and James; that he sometimes, when at the restaurant, sold cigars, but denied having sold the cigars in question to witness West; that he would find these railroad men in his baggage car, and they would give him Mexican cigars, as he had often befriended them, and that he came into possession of the broken boxes of cigars found beneath the counter by the revenue officer, and of the Mexican cigars found in the sleeping apartment, from railroad men who had been employed in

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Mexico on Mexican roads, and that these men told him they had given up their jobs in Mexico and were then returning to the United States, and that they had bought the cigars in Mexico for their own use; that when he took such cigars to the restaurant he instructed Graham and James not to sell them to anybody; that they were for his own use, and were put away under the counter, and that he did not have the cigars on hand for sale; and that he did not sell the two cigars to the witness West, and never sold any broken boxes of cigars to the witness for the government, or any one else. Charles James testified that he was a partner of the defendant in the restaurant, and that the defendant brought the broken boxes of cigars to the restaurant; that he sometimes brought them in a satchel, and sometimes in his hands; that he instructed witness not to sell the cigars to any one; that the box containing the cigars found in his trunk in the private room by the revenue officer was brought there by the defendant, and by witness placed in his trunk; that these boxes of cigars found by the revenue officer had been there for some weeks; that he never sold any cigars to the witness West; and that he and his partner Graham were the only parties who ran the restaurant, but the defendant was a partner with them. John Graham testified that he was one of the partners of the defendant and James in the restaurant, and that he and James had sole charge of its business; that the defendant was not about the restaurant except when there taking his meals, when he would come in from his run; that he had seen the broken boxes of cigars under the counter; that they were there for some time; and that he never smoked them nor offered them for sale, nor did he sell any of them to the witness West. Witnesses testified to the good character of the defendant for honesty and veracity.

Based upon this testimony, the defendant asked the court to instruct the jury "that it is not a violation of the laws of the United States for a traveler coming from a foreign country into the United States to bring into the United States cigars in packages less than fifty, if such traveler brings such cigars into the United States for his personal use; and, if such traveler so brings such quantity of cigars into the United States, he may give the same away, and such donee may keep and retain such cigars without paying revenue taxes thereon, and he may give the same away without being so taxed." On the trial the government proved the cigars in question were Mexican cigars, and the defendant testified positively and without objection that they were given to him on his baggage car on the railroad by railroad men who had been working on Mexican roads, and who were returning from Mexico to the United States, and who said they purchased them in Mexico. In view of this testimony and the regulations of the treasury department, the instruction refused should have been given. The only matter of hearsay in the testimony was the fact that the parties said they had purchased the cigars in Mexico. The means by which they acquired the cigars in Mexico was not material, —whether by gift, purchase, or otherwise. The material fact was, did they, while traveling from Mexico to the United States, severally bring with them not exceeding 50 Mexican cigars, and were the cigars they gave the defendant the cigars, or part of the cigars, brought by them

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from Mexico? If so, they had a perfect right to give the cigars to the defendant or any other person, and their donee could smoke them himself or give them to others. Whether he could sell them, we need not decide, because, as we have seen, the charge of selling is irrelevant to the issue, under the particular clause of the statute upon which the count is based, and the government has elected to stand. It should have been left to the jury to say whether the cigars were brought from Mexico and acquired by the defendant under the circumstances claimed by him. If the facts were as claimed, he was not guilty. The grounds upon which the court refused to give the instruction were that "there was no evidence before the court that the parties from whom the defendant claimed to have received the cigars had complied with the regulations of the internal revenue department, entitling them to pass the cigars free through the custom house on the line between Mexico and Texas, or that the custom-house officers at that place had passed them as free and not subject to duty or stamp under the regulations of the department"; but a traveler or passenger coming from Mexico to the United States is not required, by the regulations of the treasury department, to do anything, to entitle him to bring with him 50 Mexican cigars, or less. He may bring with him that number of cigars without the payment of any duty, and no notice is required to be taken of this number of cigars by the custom-house officers, any more than there is of the hat or shoes which the passenger or traveler is wearing. The court charged the jury to the contrary of the instruction prayed by the defendant; told the jury that if "the defendant received the cigars, if they were Mexican cigars, and unstamped with the revenue stamp of the United States, from other parties, and that he retained in his possession the said cigars for the length of time shown by the testimony of his own witnesses, then it was his duty to have put the required revenue stamp on the cigar boxes; and, as the evidence showed this had not been done, the jury should have no difficulty in reaching a verdict on this count of the indictment." From this instruction it is evident that the court's view of the law was that although the cigars might have been lawfully brought into the United States by passengers and travelers coming from Mexico, for their own use, in quantities less than 50, and therefore entitled to come in free of duty, nevertheless they were subject to the same internal revenue tax imposed on cigars made in this country, and that if they were in a box or boxes the required revenue stamp must be placed thereon, the same as if they had been domestic cigars. The court seems to have considered that the defendant's retention "in his possession of the cigars for the length of time shown by the testimony" imposed the duty on the defendant to have the boxes stamped; but, if the cigars had been brought from Mexico in the manner claimed, they were neither subject to duty nor to the internal revenue tax, and their retention for ever so long a time would not subject them to be taxed.

The instruction we have quoted was given after the jury had been considering of their verdict for 24 hours, and when they had come into the court room, on their own motion, for further instructions. After receiving this charge, the bill of exceptions recites:

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"Thereupon the jury retired to consider of their verdict, and, having failed to agree, at 5 o'clock p. m. of that day the jury were called into the court room by the court, whereupon the court again explained to the jury the meaning of the charge preferred in the third count of the indictment, as above stated, and further said to the jury that the court could not understand how the jury could hesitate about a verdict under this count of the indictment, in view of the undisputed evidence in respect of the defendant having received and retained in his possession the cigars for a considerable length of time without having placed the required revenue stamp thereon; that, unless the jurors did their duty in obeying the law as declared to them by the court, the administration of justice must be a failure. The facts being clear and uncontradicted, and the law being explicit, the court did not understand how the jury could disagree in respect of this count of the indictment."

A fatal objection to this charge is that it is based on a partial view of the facts, and lays out of account the fact that these were Mexican cigars, and the manner in which the defendant claimed to have come into possession of them, and plainly tells the jury that it is their duty to find the defendant guilty if he "received and retained in his possession the cigars for a considerable length of time without having placed the required revenue stamp thereon." As has been shown, if the cigars were Mexican cigars, and the defendant came into the possession of them in the manner claimed by him, he was not required to place a revenue stamp on them.

It is further objected to this charge that it invaded the province of the jury. It was doubtless the court's erroneous view of the law applicable to the facts as they were claimed to exist by the defendant that induced it to ignore all consideration of those facts, and tell the jury, in substance, that it was their duty to find the defendant guilty. If the court's view of the law was correct, the defendant was obviously guilty, for he admitted he received and had the cigars in his possession; and this, in the view of the court, constituted the offense, and rendered him guilty, even though the cigars had been brought into the country from Mexico, and came into his possession in the manner claimed by him. We need not, therefore, inquire whether the judge invaded the province of the jury, and transgressed the well-settled rule on that subject, as to which see Starr v. U. S., 153 U. S. 614, 624, 14 Sup. Ct. 919, 38 L. Ed. 841.

It is recited in the bill of exceptions that:

"The defendant was brought to the bar of the court, and, being inquired of as to whether he had anything further to say why the sentence of judgment should not be pronounced upon him, answered in the negative; and the court called the defendant's counsel, who approached the bench, and the court inquired of counsel whether it was his purpose to prosecute this matter any further, and, understanding that it was not, the court stated that he would enter a fine of one hundred dollars against the defendant, and give him a jail sentence of six months. Thereupon counsel said that he intended to prosecute an appeal or writ of error to the appellate court on the case, and the court called the defendant up, who was still within the bar, and directed the clerk to enter a sentence of a fine of one hundred dollars on execution, and that the defendant be confined in the jail of Iron county, Missouri, for a term of twelve months."

Due exception was taken to this action of the court, and it is made the basis of two contentions: First, that the court had no power, after once sentencing the defendant, to reconsider its action and im-

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pose another and more severe sentence; and, second, that the enhanced punishment imposed on the defendant by the second sentence was inflicted on him as a punishment for declaring his purpose to appeal the case to a higher court. The extent of the punishment to be inflicted on the defendant, within the limit prescribed by the statute for the offense, rested in the sound judicial discretion of the court. The imposition of the first sentence did not put an end to the exercise of this discretion. The first sentence was not recorded. The defendant had not yet left the bar, and had not satisfied or suffered any part of the punishment thereunder, when it was set aside and the second sentence imposed. Under these conditions, it was competent for the court to reconsider its sentence and impose a different one. Ex parte Lange, 18 Wall. 163, 174, 191, 21 L. Ed. 872. The bill of exceptions does not show that the first sentence was set aside, and the second imposed, doubling the period of imprisonment, because the defendant had declared his intention of appealing the case. A new sentence, with enhanced punishment, based upon such a reason, would be a flagrant violation of the rights of the defendant. It would be the infliction of a penalty for the exercise of a clear legal right, and would call for the severest censure. But no such motive can be imputed to the court below. This court is bound to presume that the lower court, in recalling its first and imposing a second and more severe sentence, did so from right and proper motives, and for the purpose of imposing a punishment which, upon reflection, it deemed better suited to the offense.

The judgment of the district court is reversed, and the case remanded, with instructions to grant a new trial.

NOTE.

Power of Court to Revise Sentence.

1. Power During Term.

[a] The court may, until the term ends, revise, correct, increase, or diminish a sentence which it has imposed upon a prisoner, where the original sentence has not been executed or put into operation.

—(U. S. D. C., N. Y., 1883) Ex parte Casey, 18 Fed. 86; (D. C., Or., 1876) United States v. Harmison, 3 Sawy. 556, Fed. Cas. No. 15,308;
(Ga. Sup. 1859) Jobe v. State. 28 Ga. 235;
(Iowa Sup. 1886) State v. Daugherty, 30 N. W. 685, 70 Iowa, 439;
(Kan. Sup. 1886) State v. Hughes, 12 Pac. 28, 35 Kan. 626, 57 Am. Rep. 195;
(Mass. Sup. 1861) Commonwealth v. Weymouth, 2 Allen, 144, 79 Am. Dec. 776;
(N. Y. O. & T. 1853) Miller v. Finkle, 1 Parker. Cr. R. 374;
(N. C. Sup. 1885) State v. Warren, 92 N. C. 825; In re Brittain, 93 N. C. 587;
(Ohio Sup. 1877) Lee v. State, 32 Ohio St. 113;
(Pa. Quart. Sess. 1877) Commonwealth v. Brown, 12 Phila. 600; (1878) Same v. Patterson, 1 Leg. Chron. 73.

[b] (Ga. Sup. 1895) After passing sentence in a criminal case and reducing the same to writing, it was improper practice for the court to make the penalty more severe simply because counsel for defendant expressed his intention to move for a new trial.—Meaders v. State, 22 S. E. 527, 96 Ga. 299.

[c] (Mich. Sup.) Defendants pleaded guilty to a charge, and were sen-

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tenced to prison, from and including the day of sentence. The following day they were brought into court, the original sentence set aside, and they were resentenced. *Held*, that the first sentence went into effect the day it was pronounced, and that the second sentence was a nullity.—(1889) People v. Meservey, 42 N. W. 1133, 76 Mich. 223; (1890) Same v. Kelley, 44 N. W. 615, 79 Mich. 320.

[d] (Mich. Sup. 1890) The sentence of a prisoner under a law which did not go into effect until after the crime was committed, and which does not mitigate the punishment, is an absolute nullity; and the prisoner may be resentenced under the law in force when the crime was committed, when nothing has been done by way of carrying the sentence first imposed into execution.—People v. Dane, 45 N. W. 655, 81 Mich. 36.

[e] (Miss. Sup. 1895) Ann. Code, § 969, provides that pointing a pistol at another intentionally, and then discharging such pistol, are misdemeanors, but makes, by the third clause, the killing of a person by the discharge of a weapon so pointed a felony. *Held*, that where a verdict was returned that "we, the jury, find the defendant guilty of pointing a pistol intentionally at the deceased, and the same was then and there discharged, and killed deceased," and a sentence was entered thereon as for a felony under the third clause of section 969, it was error for the court thereafter to modify the sentence, on the theory that such verdict was a conviction under the first two clauses of said section.—Thomas v. State, 19 South. 195, 73 Miss. 46.

[f] (Neb. Sup. 1895) A prisoner was sentenced to be executed on a certain day, and in the meantime remain in solitary confinement. On the following day the sentence was set aside, and a later day fixed for execution. *Held* that since the confinement was no part of the sentence, the second sentence was not void on the ground that the punishment first fixed had been suffered in part before the second was pronounced.—McGinn v. State, 65 N. W. 46, 46 Neb. 427, 30 L. R. A. 450.

[g] (N. Y. Sup. 1892) Under Pen. Code, § 697, providing that, where a convict is sentenced to imprisonment for more than a year, the term must be limited so that it will expire between the month of March and the month of November, it is the duty of the judge to resentence a prisoner when his term does not expire as prescribed.—People v. Davis, 19 N. Y. Supp. 781, 64 Hun, 636.

[h] (Pa. Sup. 1868) The practice of the court of quarter sessions of Philadelphia to reconsider sentences in cases in which the rules to reconsider have been entered at the term at which the sentences were imposed is not sustainable by the rules of the common law, as an inherent power of the courts, nor has it ever been received as the common law of the state, nor is it a good local custom within that county, nor has the court power to adopt it either expressly or by usage.—Commonwealth v. Mayloy, 57 Pa. 291.

2. Power at Subsequent Term.

[a] (Iowa Sup. 1890) Defendant was convicted of a liquor nuisance, and sentenced to pay a fine, and in default thereof to be imprisoned. Afterwards, on motion of the county attorney, and without notice to defendant, the judgment was so amended that the imprisonment should extend to one day for every $3.33 of the fine imposed. *Held*, that the order making such amendment was void, and of no effect on the judgment formerly rendered.—Eisner v. Shrigley, 45 N. W. 393, 80 Iowa, 30.

[b] (Tenn. Sup. 1880) An entry in these words: "In this case it is considered by the court that the defendant should pay a fine of $10 and the costs of the case, but suspends judgment until the next term of the court," —is a judgment, and imprisonment cannot be imposed at the next term of court.—Whitney v. State, 74 Tenn. 247.

[c] (Va. Sup. Ct. App. 1858) After a trial for misdemeanor and a verdict for a fine, the court entered up judgment for the fine and costs, and awarded a capias ad audiendum against the defendant, and at a subsequent term sentenced him to imprisonment in the county jail. *Held*, that the judgment for the fine and costs was final, and could not afterwards be modified or added to, and that awarding the capias was erroneous.—Pifer v. Commonwealth, 14 Grat. 710.

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3. Effect of Part Execution of Sentence.

[a] After a defendant has been legally convicted and imprisoned, the court cannot revoke the former sentence, and impose a new and longer one.
—(Me. Sup. 1869) Brown v. Rice, 57 Me. 55, 2 Am. Rep. 11;
(Neb. Sup. 1892) In re Jones, 53 N. W. 468, 35 Neb. 499;
(Or. Sup. 1884) State v. Cannon, 2 Pac. 191, 11 Or. 312.

[b] (U. S. Sup., Ohio, 1869) The court may, at the same term at which it was rendered, set aside a judgment of conviction on confession, though defendant had entered upon the imprisonment ordered by the sentence.—Basset v. United States, 9 Wall. 38, 19 L. Ed. 548.

[c] (U. S. Sup., N. Y., 1873) The provisions of the common law and of the federal constitution, that no man shall be twice placed in jeopardy of life or limb, are designed to prevent a second punishment for the same crime. Hence, when a court has imposed fine and imprisonment, where the statute only conferred power to punish by fine or imprisonment, and the fine has been paid, it cannot, even during the same term, modify the judgment by imposing imprisonment instead of the former sentence.—Ex parte Lange, 18 Wall. 163, 21 L. Ed. 872.

[d] (Ill. Sup. 1874) Where a defendant has been convicted on a number of counts, and the court has sentenced him to a certain imprisonment on each count without specifying whether the sentences should begin simultaneously or should be cumulative, the court has no right, after the prisoner has served out one of the sentences and obtained his discharge, to resentence him nunc pro tunc, specifying that the sentences shall follow each other successively.—People v. Whitson, 74 Ill. 20.

[e] (N. C. Sup. 1885) Where a defendant is convicted, fined, and imprisoned, and the fine is paid and part of the imprisonment undergone, the court cannot, even at the same term, recall and suspend the judgment, and at a subsequent term resentence him for the same offense.—State v. Warren, 92 N. C. 825.

[f] (N. C. Sup. 1885) During the term of court at which a prisoner is sentenced, even after the sentence has been put in operation, the court may change the punishment by shortening the term of imprisonment.—In re Brittain, 93 N. C. 587.

[g] (Pa. Quart. Sess. 1878) The defendant, having been convicted of an assault with intent to commit rape, informed the court he was just 16, whereupon the court sentenced him to pay the costs of prosecution, and committed him to a house of refuge, which declined to receive him, as he stated he was 18 years old. *Held*, that the imposition of the costs was a sentence, and as they were paid, and the house of refuge refused to receive the defendant, he must be discharged.—Commonwealth v. Patterson, 1 Leg. Chron. 73.

[h] (Pa. Super. Ct. 1898) An order of the court of quarter sessions which suspends sentence as to a part of the penalty prescribed for an offense, and imposes a pecuniary penalty upon the defendant, where fine and imprisonment constitute the penalty affixed to the crime, is a legal sentence, compliance with the terms of which renders it illegal for the court to alter or reform the sentence after the term at which trial, conviction, and sentence occurred, and any sentence subsequent thereto is illegal and void.—Commonwealth v. Keeper of Workhouse, 6 Super. Ct. Rep. 420, 41 Wkly. Notes Cas 549.

4. Necessity of Presence of Convict.

[a] (U. S. Sup., Ill., 1892) Since the time and place of execution are not, strictly speaking, any part of the judgment prescribing the penalty of death, it is not necessary that the accused should be present when a change is made in them.—Schwab v. Berggren, 12 Sup. Ct. 525, 143 U. S. 442, 36 L. Ed. 218.

[b] (U. S. D. C., N. Y., 1887) A woman duly convicted in the district court was sentenced to the state prison at Auburn, but the warden refused to admit her, because he was not permitted by the laws of the state to receive female prisoners. The court thereupon, during the same session, but in the absence of the convict, made an order modifying the sentence by substituting the Erie county penitentiary as the place of confinement. *Held*, on ha-

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beas corpus, that the criminal jurisdiction of the district courts being purely statutory, and it being apparent from the provisions of Rev. St. §§ 5541, 5542, 5546, 5548, tit. 70, c. 9, relating to "prisoners and their treatment," that the designation of the place of imprisonment is no part of the judgment, such an order could be made in absentem.—Ex parte Waterman, 33 Fed. 29.

[c] (Ga. Sup. 1878) The court may, in writing out and signing a sentence during the term at which it was pronounced, fix a period of imprisonment and labor shorter than that designated in the oral sentence, notwithstanding it is done in the absence of the accused; it being an act for his own benefit. —Plain v. State, 60 Ga. 284.

5. *Resentence in Absence of Counsel.*

[a] (N. Y. Sup. 1892) Code Cr. Proc. § 8, allowing defendant counsel in a criminal prosecution, is not violated by resentencing the prisoner in the absence of his counsel.—People v. Davis, 19 N. Y. Supp. 781, 64 Hun, 636.

6. *Power to Change Punishment Assessed by Jury.*

[a] (Ill. Sup. 1876) The court has no rightful authority to mitigate the measure of punishment found by the jury in a criminal case, and sentence the defendant to imprisonment for a less term than that fixed by the jury.—Cole v. People, 84 Ill. 216.

(107 Fed. 456.)

PFEIFFER et al. v. WILDE et al.

(Circuit Court of Appeals, Third Circuit. February 27, 1901.)

No. 32.

UNFAIR COMPETITION—PRELIMINARY INJUNCTION—REVIEW OF ORDER DENYING.

To authorize the granting of a preliminary injunction against unfair competition by imitation of packages, the right should be clear; and where it was not shown in support of the motion that any purchaser had ever in fact been deceived, and the question whether the similarity complained of was such as was likely to deceive ordinary purchasers could not be determined with certainty on the evidence adduced, the discretion of the trial court, exercised in denying the motion, will not be interfered with by the appellate court.[1]

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

Hector T. Fenton, for appellants.

E. Hayward Fairbanks, for appellees.

Before GRAY, Circuit Judge, and BRADFORD and McPHERSON, District Judges.

GRAY, Circuit Judge. This is an appeal from the order of the circuit court of the United States for the Eastern district of Pennsylvania denying a motion for preliminary injunction. 102 Fed. 658. The bill filed in this case states that the complainants are citizens of the empire of Germany, and residents therein, and that the defendants are citizens of the state of Pennsylvania; that complainants are engaged in the manufacture of a wholesome essence for coffee, used for purposes of giving additional flavor to coffee

[1] Unfair competition in trade, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper & Bros., 30 C. C. A. 376.

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and making it more palatable; that by an agent they and their predecessors had been dealing in and selling the said coffee essence in the city of Philadelphia since September, 1891. The complainants then proceed to describe their mode of putting up the said essence in tin boxes of a uniform height and diameter, and the peculiar markings on the tins and labels. They aver that on September 15, 1891, in order to protect themselves, they caused a portion of the said label to be registered, according to law, in the patent office of the United States, and that neither in 1891 nor at any time prior thereto did there exist any article, sold in any part of the United States, or in any part of the world, as complainants are informed and believe, which was distinguished by wrappers, packages, or by the manner of putting up the same resembling, or which could by any possibility be confused in general appearance or style with, the articles so put up for sale by complainants. The bill charges that the defendants, well knowing, etc., and fraudulently designing to procure custom and trade of persons desirous of purchasing and using the coffee essence sold by complainants throughout the United States, and to deceive such persons and the public, and relying upon the wide reputation and advertisement of the essence sold by complainants, and known as "Pfeiffer & Diller Kaffee Essenz," have manufactured and put upon the market another essence designed to be used for the same purposes, but put up in the same way, in imitation of the package, trade-mark, and label of the said "Pfeiffer & Diller Kaffee Essenz," and have sold large quantities of the said essence, put up in the manner aforesaid, with the intention and design that persons should believe they were buying and using the essence manufactured and sold by complainants. The other averments of the bill are that the said essence of defendants was calculated to deceive, and intended so to do, and that the defendants sold and intended to sell said preparation at a less price than that established by complainants. The prayers of the bill are for injunctions, preliminary and perpetual, to prevent the selling, etc., by the defendants, of any packages of the essence so marked and wrapped in alleged imitation of complainants' article, in violation of the trade-mark, and from unfair competition. At the hearing of the motion for a preliminary injunction numerous affidavits were filed by complainants and defendants, and the motion argued before his honor, Judge Dallas, in the court below. The argument was confined to the prayer against unfair competition, the counsel for complainants not pressing the prayer for relief against the infringement of the trade-mark, except so far as it appears on the lid of the box. The learned judge of that court filed an opinion denying the motion, as follows:

"In suits to restrain infringement of trade-mark and unfair competition in trade the decisions of the courts in other cases are not, generally, very helpful. The principles of law involved in suits are well settled, and the only difficulty usually is to properly apply those principles to the particular facts; and these, of course, are never precisely the same in any two cases. But the question presented by the present controversy arises upon facts so nearly identical with those of a case decided by the circuit court of appeals for this circuit less than two years ago that I feel constrained to accept the decision then

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made as now controlling. I refer to Van Camp Packing Co. v. Cruikshanks Bros. Co., 33 C. C. A. 280, 90 Fed. 814. I participated in that judgment, but, speaking for myself only, I may say that I regarded it as being very close to the line. Yet that judgment is binding upon this court, and, as I have said, seems to me to be determinative of the motion under consideration. The essential resemblance of that case to this one appears even more clearly when the record, as well as the report of the former, is examined. I substantially quote a portion of the court's opinion in Van Camp Packing Co. v. Cruikshanks Bros. Co., when I say of the present case that the defendants' use of boxes similar to the plaintiffs', without more, could not be complained of. It is a common way of packing various articles of merchandise; and, even if the plaintiffs were the first to apply it to packing 'coffee essence,' they have not thereby obtained a monopoly of its use for that purpose. The boxes and their markings are readily distinguishable from the plaintiffs' by intelligent persons; and with care ordinary purchasers would probably distinguish them. The question, however, is, do they bear such similarity as is likely to impose on ordinary purchasers, exercising such care only as is commonly used in purchasing such articles? This question cannot be answered with certainty or safety from the evidence before me. There is no proof that any one has been so misled. In this state of uncertainty, a preliminary injunction should not be awarded. To justify a preliminary injunction, the plaintiffs' case must be clear in all respects. See Lare v. Harper & Bros., 30 C. C. A. 373, 86 Fed. 481. In Centaur Co. v. Hughes Bros.' Mfg. Co., 34 C. C. A. 127, 91 Fed. 901, the court below refused a preliminary injunction, and the judgment reversing its decree was that of a divided court. Franck v. Frank Chickory Co. (C. C.) 95 Fed. 818, was not decided upon a motion for a preliminary injunction, but on final hearing; and it was 'manifest from the undisputed testimony that the defendants entered the field with the imitation which was both calculated to and did deceive purchasers,' etc. The plaintiffs' motion for a preliminary injunction is denied."

A careful reading and consideration of the bill and affidavits of complainants and the counter affidavits of defendants has failed to furnish this court with satisfactory grounds upon which to criticise or reverse the judgment of the court below. We cannot say that the necessity for a preliminary injunction is pressing, or that the right is clear, or that the apprehended injury is grievous. It appears by the evidence that the defendants have a large established business, and that their article has gone largely into the market. It is not apparent that the injury resulting to defendants in case a preliminary injunction was granted would be less than that resulting to the complainants in case of its being refused. It is especially noteworthy that, though several affiants on the part of the complainants below state that the packages of defendants below were capable of deceiving those who purchased them from their similarity to those of complainants below, yet none of them declare or show that any one had actually been deceived or misled by the markings on the same. Appellate courts are reluctant to interfere with the discretion exercised by a court below in the granting or denial of a preliminary injunction, unless strong reasons are presented for their doing so. Such reasons are lacking in this case, and we approve the grounds upon which the court below denied complainants' motion. The order of the court below is hereby affirmed.

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(107 Fed. 459.)

LA REPUBLIQUE FRANCAISE et al. v. SARATOGA VICHY SPRINGS CO

(Circuit Court of Appeals, Second Circuit. April 9, 1901.)

No. 29.

TRADE-NAMES—INFRINGEMENT—INJUNCTION—"VICHY" MINERAL WATER.

The name "Vichy," a geographical name applied to mineral waters by the owners of springs in the commune of Vichy, France, to designate the locality of origin, and indicate the general characteristics of their waters, long favorably known to the trade, was very prominently displayed on labels on bottles purporting to contain "Saratoga Vichy Water," the "Saratoga" over it being in far less conspicuous type, so that, if the bottles stood on a table or shelf, the word "Vichy" was the marked and prominent object of sight, but otherwise purchasers would not mistake it for the French article. *Held*, that its effect was to represent to purchasers unaccustomed to the article that the water in such bottles came from the French wells, and that the use of the name in such form should be enjoined.[1]

Wallace, J., dissenting.

Appeal from the Circuit Court of the United States for the Northern District of New York.

Charles B. Hubbell and Archibald Cox, for appellants.

Edgar T. Brackett, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. This is an appeal from a decree of the circuit court for the Northern district of New York, which dismissed the complainants' bill in equity to restrain the use of the word "Vichy" upon the defendant's bottles containing the water of the spring known as the "Saratoga Vichy Spring," and for other relief, upon the ground that the defendant's labels and advertisements improperly and unfairly misled purchasers to believe that they were buying the complainants' article, and unfairly interfered with their exclusive right to the use of the word "Vichy." 99 Fed. 733. The facts in regard to the title of the complainants to the spring at Vichy, and to the labels upon the bottles in which it is exported to this country, and the extent of its business in the United States were stated in the opinion of this court in the case of the same complainants against Schultz, 42 C. C. A. 233, 102 Fed. 154, and are as follows:

"The existence in the commune of Vichy, in France, of numerous mineral springs, which have long produced water of high medicinal value, is well known. The water began to be sold as early as 1716, and became popularly known as 'Vichy' or 'Vichy Water.' The republic of France is the owner of nearly all these springs, and by the terms of acts passed in 1853 and 1864 La Compagnie Fermiere de l'Etablissement Thermal de Vichy, hereinafter called the 'Company,' obtained the concession of the springs owned by the state for terms of years which have not yet expired. This company bottles at Vichy and sells in France and in other countries the waters of which it is the lessee, under labels which are its property, and of which the characteristic marks consist in the name 'Vichy' and the name of the particular spring, and

[1] Misleading or false labels, see note to Raymond v. Royal Baking Powder Co., 29 C. C. A. 250.

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a wood-cut vignette showing the 'Thermal Establishment.' In 1853 it began to export its water to this country, and in 1893 its shipments to this country were about 300,000 bottles. In 1896 its entire shipments amounted to nearly 10,000,000 bottles. The natural waters are exported in their original condition, and are not artificially charged with gas."

The township of Saratoga Springs has long been known as abundant in mineral springs, the waters of which are distinguished by different names, and in March, 1872, the geyser or spouting spring of the defendant was discovered in that town. The water is alkaline, is regarded by medical men as a valuable mineral water, and has been recommended extensively by the defendant as having a wonderful similarity to the Vichy waters of France. The water was bottled and sold in 1873, and thereafter until 1876, by the owners of the spring, when the defendant, under the name of the Saratoga Vichy Spring Company, became the owner, and has since sold the water extensively under the name of Saratoga Vichy Water, or Natural Saratoga Vichy Water. The bottles, circulars, and advertisements have invariably used the words "Saratoga Vichy." The water is highly charged with natural carbonic acid gas, and is bottled under a high pressure of that gas. The water of the complainants is a still water. It was stipulated that the testimony in the Schultz Case could be used in this case by either party, and from that testimony it appears that the manufacture of artificial sparkling water, compounded after the analysis of Vichy water, has been extensively carried on in this country since 1862 under representations of its artificial character; that it was understood by intelligent purchasers to be artificial; and, as one was a sparkling and the other a still water, there was no confusion in the public mind as to the identity of the two articles, and the manufactured Vichy became an article distinct from the still water of the natural spring. The bottles and labels of the complainants and the defendant have been very unlike each other in general appearance and character, and one could not be mistaken for the other by any person who had an acquaintance with either. Until 1896 the words "Saratoga" and "Vichy" upon the labels were substantially in the same style and size of type, and the name "Saratoga" was as prominently displayed as the name "Vichy." In 1896 a neck label of white paper, printed in black and red letters, was added by the defendant to its other labels. The word "Vichy" is very prominently displayed, and the "Saratoga" over it is in far less conspicuous type; so that, if the bottle stands upon a table or a shelf, the word "Vichy" is the one which is the marked and prominent object of sight. Like the manufactured water, the Saratoga water is understood by consumers to be sparkling, and to have in that respect a character distinct from the still natural Vichy. It does not appear that the complainants expressed dissatisfaction with the acts of the defendant until the time of the commencement of this suit. So long as the defendant confined itself rigidly to the universally conspicuous declaration upon its labels and bottles and in its advertisements that the contents of the bottles were Saratoga Vichy Water, it did not violate the rights of the complainants, because Saratoga Vichy and the Vichy of France are well understood

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to be different articles, in that one is a sparkling and the other is a still water. They are used differently, and, when used, no person could mistake one for the other. In this respect both the natural water of Saratoga and the manufactured water of Schultz resemble each other, and accordingly our decision in the Schultz Case intimated very strongly that, after the alteration by Schultz of his labels, subsequent to the commencement of the suit, so as to assert that his article was artificial Vichy manufactured by himself, he was not open to the charge of unfair competition. Until 1896 the defendant's bottles uniformly and without disguise declared that the contents were Saratoga Vichy Water, and thus proclaimed the difference between two well-known articles; but in the label of 1896 the defendant unfairly disregarded the previously acquired right of the complainants to the use of the word when applied to the product of their wells. The effect of the label is to represent to the purchaser not accustomed to the article that it is Vichy water, and "Vichy" properly signifies water from the French wells. It is, in fact, an untruthful label, employed for an objectionable purpose. It is true that a mere geographical name, without attending facts which have caused the name to become significant of a particular manufacture and to identify the manufacture as the product of a particular person, is not the subject of a trade-mark. The distinction, however, between mere names of a locality and the secondary signification of names which identify an article with its manufacturer or producer, and which tell the public that an article so produced is of singular excellence, with the result that the use of the name by a nonresident producer is unfair to the competitor and fraudulent to the public, has been long recognized. Elgin Nat. Watch Co. v. Illinois Watch-Case Co., 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365. The decision in Canal Co. v. Clark, 13 Wall. 311, 20 L. Ed. 581, referred only to a denial of the exclusive right of a resident of a district of country to the application of its name to a well-known article of commerce,—in that instance coal,—so "as to prevent others inhabiting the district or dealing in similar articles coming from the district from truthfully using the same designation." The decisions are abundant that where the name of a district of country has been used by an inhabitant of that district to identify his product, and has become significant of the success and a declaration of the superiority of the product, a nonresident manufacturer cannot properly use the name to deceive the public and fraudulently obtain the good will which belongs to his competitor. Thus a watchmaker of some other town than Waltham cannot properly call the articles which he produces "Waltham Watches." The opinion in Flour Mills Co. v. Eagle, 30 C. C. A. 386, 86 Fed. 608, which exhaustively collates the authorities upon the subject, among which Thompson v. Montgomery, 41 Ch. Div. 35, and Wotherspoon v. Currie, L. R. 5 H. L. 508, are important, states as the result of the decisions the distinction which has been referred to as follows:

"The distinction, both in the English and American cases, is between those where a geographical name has been adopted and claimed as a trade-mark

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proper and those where, as in the case at bar, it has been adopted first as merely indicating the place of manufacture, and afterwards, in course of time, has become a well-known sign and synonym for superior excellence. In the latter class of cases persons residing at other places will not be permitted to use the geographical name so adopted as a brand or label for similar goods for the mere purpose by fraud and false representation of appropriating the good will and business which long-continued industry and skill and a generous use of capital has rightfully built up."

The label of 1896 comes within the spirit of this prohibition, for it untruthfully tends to mislead the unwary purchaser, and to gain the reputation which the Vichy natural springs have acquired.

The defendant should be enjoined against the use of this neck label, or of any other label in which the place of the origin of its water is not as plainly and prominently made known as the fact that it is named Vichy. Let the decree of the circuit court be reversed, with costs of this court, and the case be remanded to the circuit court, with instructions to enter a decree in accordance with the principles herein expressed, and for an accounting of damages from the use of neck label of 1896, with costs of the circuit court.

WALLACE, Circuit Judge. I dissent from the opinion of the court, because, as I view the facts, the case does not disclose any attempt on the part of the defendant to represent its mineral water to purchasers as the French Vichy. In its advertisements the defendant has studiously presented its water to the public as a product of its spring at Saratoga; and the labels and dress upon its bottles not only have never borne any similitude to those upon the bottles of the complainants, but have always distinguished it as Saratoga Vichy Water so plainly that misapprehension by purchasers was impossible. The word "Saratoga" is the valuable part of the descriptive name, because the reputed therapeutic virtues of Saratoga waters have rendered them the most popular mineral waters known in the markets where the defendant's water is offered for sale, and no sane man having the right to sell his mineral water as a Saratoga water would be tempted to suppress that part of the name, or sell it by any name which would denote a different origin. All the Saratoga waters are bottled and sold by distinctive names, such as "Saratoga Congress Water," "Saratoga Hathorn Water," etc., and the defendant, in naming its water "Saratoga Vichy," did so merely to distinguish it from the other Saratoga waters, and selected "Vichy" as its distinctive name because its alkalinity assimilated it more nearly to the French Vichy. The label which has met with animadversion in the opinion of the court is one used on the neck of the bottles. It is a fancy label, having a white background, and printed upon it in red and black letters are the words "Saratoga Vichy." The word "Saratoga" is above the word "Vichy," but included between its extended V and Y. It is true that it is in smaller letters, but the letters are an eighth of an inch in height and breadth. Although not so conspicuous as the word "Vichy," it is so prominent that it is almost inconceivable that it would not be observed across a counter. If this were the only label on the bottle, there would be color for the theory that it might mislead

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casual purchasers; but just below it is another label, covering nearly half the surface of the bottle, upon which are printed in letters three-fourths of an inch in length and breadth the words "Saratoga Vichy Water."

The decree which is authorized by the opinion will not be of the slightest practical benefit to the complainants, and will have no effect except to subject the defendant to expense, for I cannot believe that any person ever has been misled, or ever can be misled, by the use of the neck label, as the defendant has always used it, in conjunction with the body label.

I agree with the conclusion of the court below that the bill should be dismissed.

(107 Fed. 488.)

KURSHEEDT MFG. CO. v. NADAY et al.

SAME v. ADLER et al.

(Circuit Court of Appeals, Second Circuit. April 9, 1901.)

Nos. 116 and 117.

PATENTS—INFRINGEMENT—PLAITING MACHINE.

Panse patent, No. 595,728, for a plaiting machine, in which the only patentable features are the peculiar shape of an undulating knife or blade, and the manner of permanentizing the shape of the fabric after it is plaited, and in which there is a vibratory motion of the knife and a step by step movement of the rolls, is not infringed by a machine which has neither of these movements, and in which the devices which produce plaits are totally different.

Appeals from the Circuit Court of the United States for the Southern District of New York.

These two bills in equity were brought in the circuit court for the Southern district of New York to restrain the respective defendants from the alleged infringement of letters patent No. 595,728, dated December 21, 1897, to Friedrich W. Panse, assignor to the complainant, for an improvement in plaiting machines. The machines used by each defendant were alike, and the cases proceeded to final hearing upon a single record. The bills were dismissed by the circuit court (103 Fed. 948), and the defendants in each case appealed to this court.

Arthur v. Briesen, for appellants.

Hector T. Fenton and Benno Loewy, for appellees.

Before LACOMBE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The object of the invention was an improvement upon a plaiting machine which would furnish wavy edges to plaited fabrics. The plaiting machine which the patentee described in his specification was the ordinary "side-plaiting" machine, for making flat plaits. Such a machine consists "essentially of a pair of parallel rolls adapted to be heated and arranged to be reciprocated, and which have a short up and down motion of a knife or blade arranged horizontally. The knife forms the plaits by a forward and upper motion, and the rolls are then reciprocated, and act to" make

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the plait permanent, which is what the patent calls "permanentizing" the plait. The alternate motion of the blade, by which it is entered between the rolls and withdrawn from such position alternately, and the step by step rotary motion of the rolls, are described in the specification. The patented improvement consisted in giving to the blade of a side-plaiting machine, either straight-edged or saw-toothed, an edge which produced a wavy edge upon the plaits. The edge of the blade was provided with teeth, one set having convex outer edges, and the adjacent teeth having concave outer edges; "the convex and concave teeth being placed alternately, in order to produce a wavy-edge blade." For a more particular description of the teeth, the specification says:

"The undulations or waves in the edges of said blade are of such a depth as to enable the said blade to impart to the plaits which it makes in the fabric wavy edges corresponding in size and shape to the waves or undulations of the blade."

The specification also says (and the paragraph is deemed by the complainant to be important):

"It will be obvious that this waved edge or blade may be of any desired construction, and undulated or serrated in any manner to produce a wavy edge, and may co-operate with the devices other than the rolls here shown to effect the plaiting."

The patent contains two claims, of which the first only is said to have been infringed, and which is as follows:

"(1) In a machine for forming wavy-edged plaiting, the combination of a blade for forming the plaits, the plait-forming edge thereof being of a continuously undulating outline, and the waves in the edge being of such depth as to impart a wavy edge to the plaits, and means for permanentizing the plaits imparted to the fabric by the said edge."

The progress of the patent through the patent office was impeded by the persistence of the examiner in calling the attention of the applicant's solicitors to patent No. 122,137, dated December 26, 1871, to William M. Storm, for plaiting or "puffing" and "festooning" fabrics. The only teeth shown in the drawing of the patent are those for making puffs or festoons in a muslin skirt, and are quite irregular in height. The patent office required an amendment of the claims which should describe the construction of the waved edge of the blade. The requirement was complied with by the introduction of the words "the plait-forming edge thereof being of a continuously undulating outline," and the patent was issued. Although the defendants made much in their argument of the Storm and the Painter inventions, the latter being shown in patent No. 193,029, dated July 10, 1877, for a hand plaiter, which more closely approach to the Panse blade than do any other alleged patented anticipations, we think that the device of the patent in suit was a patentable, though narrow, improvement. The Painter device was a hand tool with one blade, which had "a long central upward curve and two half terminal curves," by the aid of which the fabric was bent into an undulating edge. The blade had not the peculiar convex and concave edges of the Panse blade, and never could produce its wavy-edged plaits. Panse's title as the originator of the improvement upon the previous irregularly toothed or upon straight-edged blades, which consisted in a blade with alternate

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concave and convex edges of such a depth as to impart to the plaits corresponding wavy edges, was not successfully attacked by any anticipatory patent. His entire machine, as described in the specification, consisted of an old side-plaiting machine with the new blade. The defendants have adapted a serrated blade to a chain fluting machine,—a well-known machine for making flutes, which are longitudinal parallel ruffles with round edges; the distinction between plaits and flutes being that the former have angular edges and are flat, whereas the latter have round edges and stand up. A chain fluting machine consists essentially of a pair of endless parallel chains passing around two opposite pairs of shafts; the chains having links or blades pivoted thereto which intermesh together. The mode of operation of the defendants' machine is shown in the written description of it furnished to the complainant by the defendants, as follows:

"The blades of the lower set or chain have curvilinear serrations on the biting edge in order to impart a transverse plaiting effect to the plaits formed thereby, as will be seen by inspecting Fig. 5, which is an exaggerated view of such edge, while the upper set of blades, d, which mesh with the lower set of blades, and the two acting together in a heated condition, permanentize the plaits imparted to the fabric simultaneously with the formation of the plaits. * * * The fabric is fed into the machine at the point marked 'p' in Fig. 3, and is grasped between the moving chains of blades and given a plaited serrated edge longitudinally with a curvilinear edge laterally, and is carried along by the said blades until the two chains separate at the point q, where the fabric is delivered. In its progress through the plaiting devices the fabric receives longitudinal plaits with curvilinear edges, which plaits so found are simultaneously permanentized by the heat and pressure of the meshed blades which form the plaits, aided by the heat applied to both of them."

Although flutes and flat plaits are different things, by this mechanism the rounded edges of the flutes are to a certain extent flattened and are given a wavy appearance; and this result is produced by the action of the serrated links or blades, and corresponds with the result in the side-plaiting machine. The round flutes have not become perfectly flat plaits, but for the purposes of this case it can well be assumed that the wavy result is in the two machines the same. The question of importance is that of infringement, and is whether a common result is produced by substantially the same or by very different means, and a substantially different mode of operation. The Panse machine was a side-plaiting machine adapted exclusively to the production of flat plaits, and in the machine a serrated blade having a vibratory motion grasps the fabric, forms the plait, enters between the rollers and withdraws therefrom, having cleared itself from the fabric. The pressing and ironing rollers having a step by step rotary motion, so that they can hold the fabric while the blade forms the plait, carry the plaited fabric forward, and press the plait into permanency. The serrated blade of the defendants' machine is one set of the chain links, which have no vibratory or alternating forward and receding motion. The chain links have no step by step motion, and the two sets of links co-operate to make, heat, and press the flutes or plaits by a simultaneous operation. It is only by giving a very wide construction to the claim that the elements of the modified fluting machine of the defendants can be included in the patented combina-

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tion, because the means of the defendants do not create the result in the way or by the mode of operation of the peculiar and distinguishing devices of the side plaiter. The complainants lay stress upon the clause in the specification which has been heretofore quoted, to the effect that the waved edge of any desired construction may co-operate with devices other than the described rolls to effect the plaits. Of course, it is not supposed that by this language the combination of any waved blade and any pressing devices which will accomplish the result can be properly claimed, but the complainants desire by a dexterous use of language to make the defendants' means sufficiently analogous to the described means to justify the charge of infringement. The two machines are so unlike each other in the mode in which they respectively operate (that is, in the combination of devices which produce a plait in one and a flute in the other) that infringement of the complainants' patent does not exist.

The decree of the circuit court is affirmed, with costs.

(107 Fed. 491.)

MOORE v. EGGERS.

(Circuit Court of Appeals, Sixth Circuit. March 5, 1901.)

No. 874.

PATENTS—INFRINGEMENT—APPARATUS FOR DIGGING TRENCHES.

The Moore patent, No. 524,502, for improvements in hoisting and conveying apparatus used in digging and refilling sewer trenches, while it discloses patentable invention and is valid, is limited by the prior art, as well as by the language of claim 1, to means for carrying the moving parts of the apparatus high enough to clear the lining of the trench and the heads of workmen therein, which, as described, consist of the use of a moving car or conveyor, run upon tracks laid on either side of the trench, upon which the buckets of earth are hoisted by means of a hoisting apparatus, and which is constructed "with an open base frame," having no timbers across it below the platform upon which the operator stands, and which is placed at a considerable height above the trucks. The patent is not infringed by a conveyor which lacks the element of the open base frame.

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

The bill in this cause, filed by Moore, the appellant, charged the defendant, Eggers, with the infringement of the first claim of letters patent No. 524,502, issued to the appellant, August 14, 1894, for the invention of an improvement in "hoisting and conveying apparatus." The defendant denied infringement, and upon that issue the case was heard and determined in the circuit court; the validity of the appellant's patent not being disputed. That court, being of opinion that infringement was not shown, dismissed the bill. Thereupon the complainant appealed.

Arthur E. Parsons and George W. Hey, for appellant.

R. S. Taylor, for appellee.

Before LURTON and SEVERENS, Circuit Judges, and CLARK, District Judge.

SEVERENS, Circuit Judge (after stating the nature of the case as above). The invention covered by the appellant's patent relates to a class of machines then in quite common use, and of which there were various forms of construction. Many of them had been patented in

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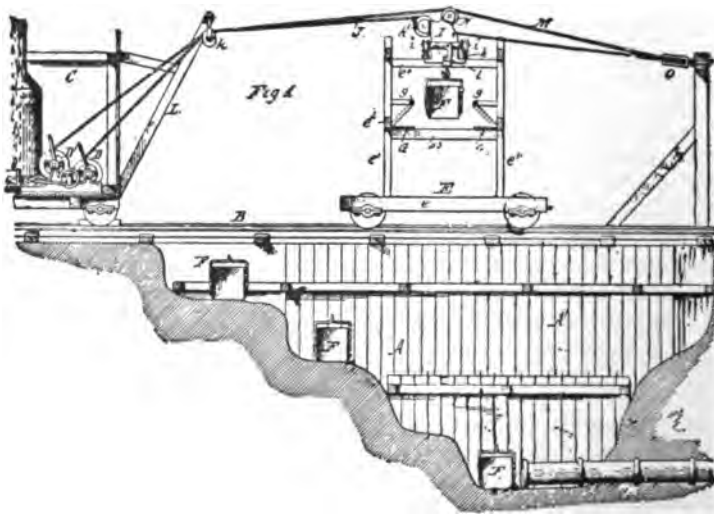
this country, and some of the patents are shown in this record. They were intended for use in excavating and refilling trenches in constructing sewers and for similar purposes, and their principal feature consisted in their adaptation to a mode of operation whereby the earth was excavated, lifted, and carried back on the line of the trench, and filled in over the pipes; the latter having been laid intermediate the excavation and refilling. In this way only a limited portion of the trench need be open at any time, and the labor of rehandling the earth was avoided. They were long structures, running lengthwise of the trench, their length depending largely upon the distance over which the excavated material was required to be carried. Moore's patent professes to be for improvements on such machines, and acknowledges the existence of two of the principal patterns, namely, one in which the carriage conveying the buckets used in transportation was run from one end of the machine to the other on elevated tracks supported by movable trestles, which are shifted as the work progresses, the carriage being propelled by power located at one end of the apparatus, and the other one in which the power, an engine and boiler, together with the hoisting mechanism, were transported back and forth on tracks provided for the purpose. With regard to the first of these forms, Moore in his specification states the objections to be that:

"Such trestles constitute an expensive part of the apparatus, and, as they span the trench at short intervals, they form obstructions which interfere in a measure with the workingmen."

He states the objects of his invention to be—

"To dispense with the trestles heretofore employed, and thus reduce the cost of the apparatus; also, to so construct the apparatus as not to interfere with the workingmen or the sheeting used for preventing caving in of the walls of the trench; and, finally, to simplify the tackle for operating the hoisting and conveying mechanism."

The following are the drawings which accompany his specifications:



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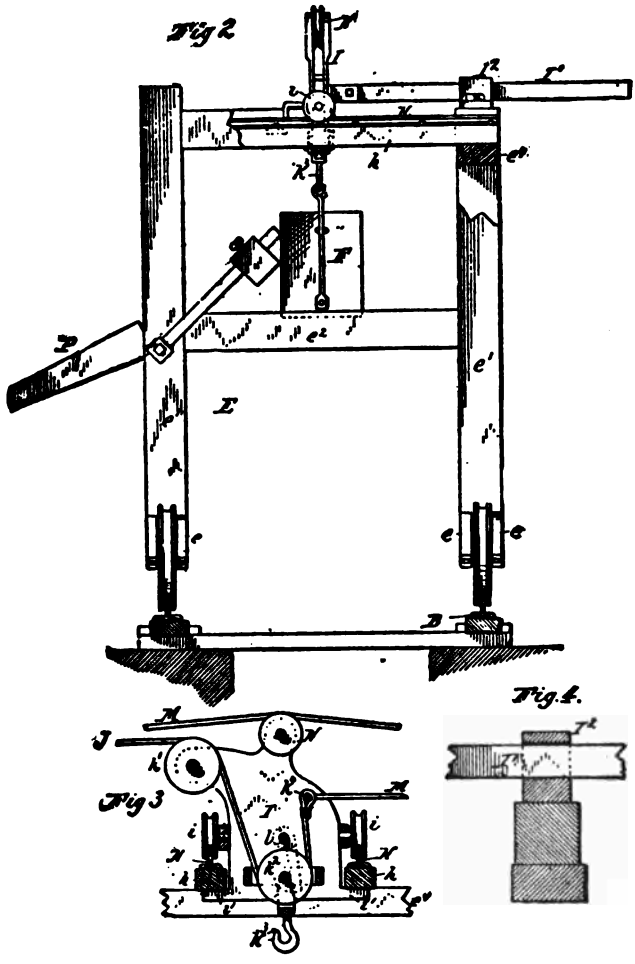

Fig. 1 is a sectional elevation of the apparatus. Fig. 2 is an end view of the conveying car. Fig. 3 shows the hoisting apparatus located on a carriage having wheels running on a track transversely across the conveying car, to facilitate dumping out at the side of the track or on one side of the central line of the trench. Fig. 4 represents a detail of construction. The hoisting cable, J, is attached at one end to the drum on which it winds, and extending over pulleys, k and k^1, and running under the vertically moving pulley, k^2, is secured at the other end to the carriage at k^4. The draft and stay cable, M, is attached at one end to the drum, D^1, on which it winds, and extending over the pulleys, k and N, and around the pulley, O, which is fastened to a rigid post, runs back to the carriage, to which it also is secured at k^4. The primary purpose of these cables is the one to hoist and lower the bucket; the other,

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to move the conveying car along its tracks. The cables also perform a subordinate function in operating the mechanism, which it is not now necessary to explain. The specifications explain in detail the construction of the conveying car, E. In the main it is shown by the drawings. There is a raised platform at G, on which an operator stands to manage the hoist and signal the engineer. The cross timbers, e^2, of the frame are at the same height with the bottom of the platform, and of these, the cross timbers, and platform, the inventor says:

"By elevating the cross timbers and platforms of the conveying car, as shown in the drawings, the car clears the sheeting which usually projects above the trench when the same is started, and the danger of the car striking the workingmen in passing back and forth over the trench is also avoided."

He also states, in explaining the operation of the hoisting apparatus, that:

"The hoisting bucket, in being raised and lowered, passes through the aperture formed by the open base frame and the raised frame of the car."

By the "open base frame" we understand the space under the platform, G, and the cross-bars, e^2, is meant, and by the "raised frame," that part of the car which is above the "open base frame." Other parts of the specifications describe other features of the patent not involved; and it is believed that the drawings, with the foregoing explanations, are sufficient for the purposes of the present inquiry.

We have already referred to the recognition by the patentee of the pre-existing art. It would be tedious to go through with a detail of all the patents offered in evidence by the defendant to show the extent of the progress which the patentee was bound to acknowledge. We will refer to some of them. In 1871 patent No. 117,778 was granted to Hoffman for a machine for hoisting and carrying weights or heavy bodies. This showed an elongated trestle, in the upper part of which were built tracks running lengthwise. On these tracks was a carriage with wheels. The carriage frame descended below the tracks, and in that part of it was a pulley over which ran a cable to operate the hoist. When the load was lifted from below to the carriage, the hoisting apparatus was locked to the carriage, and the carriage, with its load, was drawn by the cable along the track, lengthwise of the trestle, to the place of deposit. This apparatus does not show a track with sufficient elevation to carry the load clear of men working below, nor is the trestle movable on tracks. In 1883 a patent, No. 277,403, was issued to Baldwin for a hoisting device for elevating coal, ore, and other like material. This appears to have been adapted, also, to the purpose of excavating wells and carrying the earth away from the opening. It shows a frame standing on wheels, and in the upper part of the frame was a hoisting apparatus. Tracks were laid, on which the wheels were to run. In operation the bucket was hoisted by the hoisting apparatus into the opening in the lower part of the frame, and thereupon the frame, with its load, was moved off on the track to the place of deposit. This patent, also, did not contemplate carrying the load at an elevation. In 1885 a patent, No. 333,456, was

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issued to Ford for an "elevating and carrying apparatus," similar in most respects to Baldwin's, which showed a frame into the opening of which the bucket was lifted, whereupon the frame or conveyor was moved along on wheels and tracks to a place of deposit. This, also, did not contemplate a clearance below. In 1886, patent No. 346,850, was granted to Hunter for an apparatus for hoisting stone. This patent shows a conveyor of similar character. It seems, from the drawings, to have been high enough to carry the load over the heads of the workmen; but there is a cross beam at the bottom of the frame, as there is in the conveyor of the defendant's machine, which is alleged to infringe, which cross-bar would preclude workmen or projecting obstacles from standing or being in the line of the movement of the conveyor. Like those already described, the conveying frame was built on wheels and moved on tracks. The load was lifted into the opening of the frame of the conveyor. The next patent which we shall notice is No. 422,826, granted to Peterson, March 4, 1890, for a stone lifting and carrying machine. In this patent the track was supported on "suitable trestle work." The conveyor contained a hoisting apparatus, which lifted the load into the open bottom of the frame, and, when lifted, the load was taken by the conveyor to the place where it was deposited. In the upper part of the frame was a track running across it, and a carriage supporting the load, which could be moved from side to side of the conveyor, so as to deposit the load at either side of the central line of the tracks below, as in the Moore patent, and there was a platform at each end of the conveyor for the operator. This pattern of machine, although intended for hoisting and conveying stone, was equally adapted to hoisting and conveying earth, which would be but another use of it. Then, on May 20, 1890, patent No. 428,437 was issued to White, for an "apparatus for raising and moving earth." The frame in this patent was long, consisting of interchangeable lengths, which were supported by rollers running on tracks. In the upper part of the frame was a track running lengthwise, on which a carriage was propelled, carrying a bucket, which was first lifted up into the frame and locked to the carriage. The carriage, as well as the hoist, was actuated by cables extending to them from a drum or drums driven by the engine at the end of the apparatus. These cables were carried up from the drum or drums (for there might be more than one drum) over pulleys, which were at all times as high as the top of the carriage and quite out of the way of anything below. Platforms were arranged part way up on the inside of the frame on either side for the operator to stand upon while managing the lifting apparatus. The patent does not contemplate, or at least does not express, the purpose of having an opening in the base of the frame adapted to clear the workmen or the sewer constructions below, though to one looking at the drawings it would seem but a step further, plainly indicated by a need for it, to have added that feature.

It is manifest that the structures shown by former patents anticipated Moore's in all other features except the open base of the conveying car and the means of carrying the cables aloft. There was nothing new in the hoisting apparatus contained in the car. The

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essence of his invention, as indicated by his own declarations, as well as by the limitations imposed by the state of the art as shown by the evidence, consisted in the production of the means for carrying the moving parts of the apparatus high enough to clear the lining of the trench and the heads of workingmen, during the process of excavation and transportation; and, further, it is clear that the patentee intended it should be carried sufficiently high to permit the excavation to go on from the beginning without danger, for, in the practice with the older apparatus, the clearance was effected when the trench itself was deep enough. We are not here referring to that part of the invention which relates to the details of the cables or the peculiarities of their functions, for we are concerned only with the first claim, which does not involve any peculiarity in them except the position they occupy. This first claim is as follows:

"In a hoisting and conveying apparatus, the combination, with tracks arranged lengthwise of the trench to be excavated, of a conveyor car running upon said tracks and provided with an open base frame and an open raised frame, forming an aperture for the passage of the hoisting bucket, a platform arranged on said frame adjacent to said aperture, and guide wheels mounted on the raised frame above said platform, and hoisting and draft cables running over said guide wheels, respectively, whereby such cables are supported clear of the operator standing upon said platform, substantially as set forth."

The second claim (there are but two) includes in a combination the peculiar attachments and adjustments of the cables. The infringement of this claim is not charged.

The defendant's machine, which is charged to be an infringement, is shown by the accompanying diagram.

It contains a car running lengthwise of the trench and carrying the hoisting apparatus; but the tracks on which it runs are supported by a trestle. This, though, was an old method of construction, which Moore essayed to improve. There is no "open base frame," as in the Moore patent (which there must be in order to exhibit the invention), open at the ends of the frame, having reference to the direction of the car when in motion. The axles of the wheels of the car run from side to side across the trench, and there is also an end piece in the bottom timbers of the car, which extends across the trench, thus closing in the bottom of the frame. In the first claim of the Moore patent the conveying car is stated to be one having an "open base frame," and it would have defeated the object of his invention to have built his frame without an open base. Moreover, having thus described his conveyor in his claim, he puts it forward as a constituent of his invention, and he could not now say that the kind of frame he will employ is indifferent. Keystone Bridge Co. v. Phœnix Iron Co., 95 U. S. 274, 24 L. Ed. 344; Fay v. Cordesman, 109 U. S. 408, 3 Sup. Ct. 236, 27 L. Ed. 979; Brown v. Manufacturing Co., 6 C. C. A. 528, 57 Fed. 731; Manufacturing Co. v. Randall, 43 C. C. A. 578, 104 Fed. 355.

Besides all this, if he were permitted to construe his claim as including tracks built on trestles and a conveyor which was not open at the ends, so as to admit of its safe passage over the trench lining and the heads of the workingmen, it would destroy his patent, so far as that claim is concerned, for it would reduce it to the prior art.

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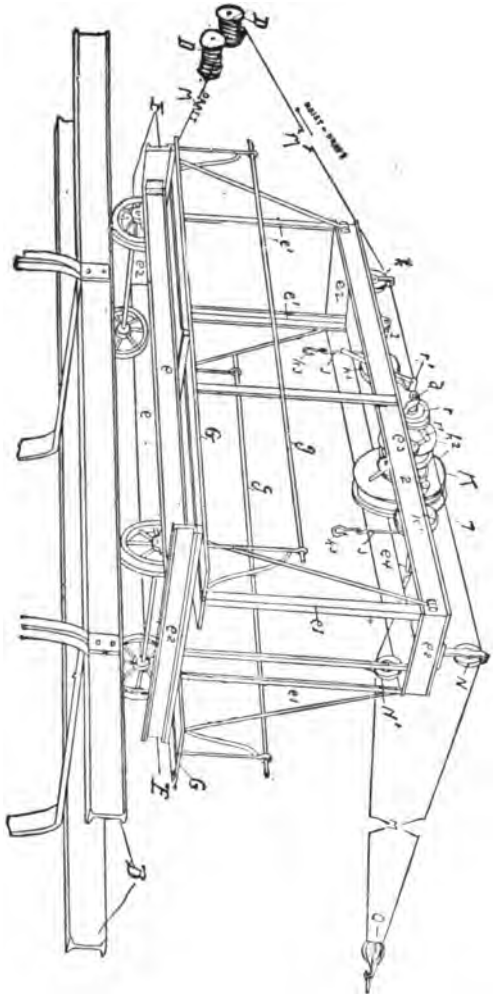

Fig. 1.

If the Moore patent had preceded all other devices for performing the work for which it was intended, it might very well be that he could bring under tribute all who should enter his domain, and build within the wide four corners of his invention; or, if he had made a large advance in a new direction in an art not new, he would have been protected to the extent of the limits of his large invention. These are propositions which were applied by the supreme court in Morley v. Lancaster, 129 U. S. 263, 9 Sup. Ct. 299, 32 L. Ed. 715, and by this court in the cases of McCormick Harvesting Mach. Co. v. Aultman, Miller & Co., 16 C. C. A. 259, 69 Fed. 371, and Bundy Mfg. Co. v. Detroit Time-Register Co., 36 C. C. A. 375, 94 Fed. 524. It is contended by counsel for the appellant that Moore's invention is of a primary character, and should have the benefit of the liberal

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construction accorded to inventions of that character. But, as we have shown, this invention stands on distinctly narrow ground, and there is no room for broadening it.

It is quite clear to us that the decision of Judge Coxe, in the case of Moore v. Marnell (C. C.) 93 Fed. 467, a case founded on the same patent, which has been cited and considerably relied upon by the appellant, was controlled by the supposition, arising from the inadequate record before him, that Moore's invention covered an extensive field, which entitled it to a liberal construction; but in the present case it is made clear that, while the invention was both novel and useful, it had no wider scope than the special feature of the construction which he devised to carry his car and the apparatus it contained safely over the heads of the employés and the linings of the trench, and at the same time saving the expense of a trestle on which to lay his track. If the base frame of the patent were cut out, and the raised frame dropped to the wheels, we should have nothing new in it. His specifications would be unintelligible and the substance of his invention eliminated. The defendant does not use an open base frame conveyor, but a combination of elements found in the old art, assembled to perform the same service theretofore performed by them, and, therefore, does not infringe the complainant's patent.

Having reached this conclusion, it is unnecessary to inquire whether the further point made by defendant's counsel, that the fact of the defendant's track being carried on trestles while the complainant's rests upon the ground, as counsel insists it must to fulfill the patent, would relieve him from the charge of infringement, is well taken or not. Nor do we need to advert to any supposed modification of the invention patented to Moore by what transpired during the progress of his application through the patent office. Giving his first claim all the scope that the existing art will admit, we are quite clear that the charge of infringement is not made out. The decree of the circuit court dismissing the bill will therefore be affirmed.

(107 Fed. 498.)

BROWN HOISTING & CONVEYING MACH. CO. v. KING BRIDGE CO.

(Circuit Court of Appeals, Sixth Circuit. February 12, 1901.)

No. 825.

PATENTS—PATENTABLE INVENTION—HOISTING AND CONVEYING MACHINES.

The Brown patent, No. 300,690, for an improvement in hoisting and conveying machines, used chiefly in unloading heavy cargoes, such as coal and ore, from vessels, and conveying the same to a distance,—the improvement described in the first three claims consisting in providing a jointed connection between the truss which carries the track of the conveyor and the piers upon which it is supported at or near either end, so as to permit the first end of the truss and the pier supporting it to be moved laterally without straining the parts or moving the second pier,—is void for anticipation and lack of patentable invention. The idea of making articulate connections between the truss and piers, broadly claimed as new in the patent, was disclosed in prior patents; and the

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specific devices described in the claims for making such connections were old and well known, and such as would readily suggest themselves to a skilled mechanic as appropriate to accomplish the object desired.

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

This is a suit in equity upon a bill filed by the appellant, the Brown Hoisting & Conveying Machine Company, complaining of the infringement by the King Bridge Company, the appellee, of rights secured by letters patent No. 300,690, issued by the United States June 17, 1884, to Alexander E. Brown, the assignor of complainant, for improvements in hoisting and conveying machines. The bill is in the usual form. The answer denies that there was any novelty in the supposed invention, or that it exhibits patentable invention. It further denies that Brown was the first inventor of the alleged improvements, and sets forth a list of 30 or more French and American patents which it is averred embodied the supposed invention of Brown, and also alleges that the said invention was in public use at Cleveland, Ohio, by the Cleveland Rolling-Mill Company, in 1881, at a date more than two years prior to Brown's application. The defendant also denies infringement. A replication to the answer having been filed, proofs were taken by both parties, consisting mainly of the patent in suit, the assignment thereof, and of prior patents for similar machines, and the prior use by the Cleveland Rolling-Mill Company, set up in the answer, with evidence by experts explaining and illustrating the patent in suit, and the prior patents and machines which were supposed to be relevant to the issues in the case. At the hearing on pleadings and proofs the bill was dismissed. The complainant brings the case here by appeal.

R. S. Taylor, for appellant.

Thos. W. Bakewell and S. H. Tolles, for appellee.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

SEVERENS, Circuit Judge, having stated the outline of the case as above, delivered the opinion of the court.

This case was decided by Judge TAFT shortly before his resignation, and in consequence of the pressure of other duties no written opinion was filed by him. We have nothing in the record, therefore, to inform us of the ground of his decision. But we were advised by counsel at the hearing that it was understood to be that the supposed invention was not new, having been anticipated. It will be convenient to take up this question first. The invention professes to be of improvements in hoisting and conveying apparatus. The machine, so called, is of large dimensions and is of a kind used principally for the purpose of lifting heavy cargoes, such as coal and ore, out of ships and barges when lying at the wharf, and conveying them back from the water side to a convenient place for depositing; but it is adapted to any like use in taking up heavy material and conveying it from one place to another. That part of the structure to which the invention relates, and with which we have to deal, consists almost entirely of the connections between the hoisting and the conveying apparatus. The principal features of such machines are a truss or bridge from 100 to 300 feet in length, supported by two piers, one at or near each end, and having tracks built inside the truss whereon the wheels of the conveyor move in taking the load from the hoist to the place of discharge and in returning. The front pier stands near the edge of the wharf. The other is towards the rear end of

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the truss, which latter stands nearly perpendicularly to the wharf line. The front end of the truss carries a projection wherein is provided means for lifting the matter to be moved up to the track of the conveyor, from whence it is taken to the place of delivery as above stated. Usually one of the piers is supported by a fourwheeled truck, the wheels of which rest on two parallel tracks, which are also parallel with the wharf line. The other pier is, in the more common use of such structures, in the form of a triangle, supported by two wheels only, and these rest on a single track, which is parallel to those under the other pier; the object being to provide for moving the machine by simultaneously, or nearly so, moving its two ends in a direction parallel to the edge of the wharf. Figs. 1 and 2, with the description thereof by the applicant given in the specifications, and the details above enumerated, show with sufficient distinctness for the present purpose the nature of the improvements patented:

FIG. 1.

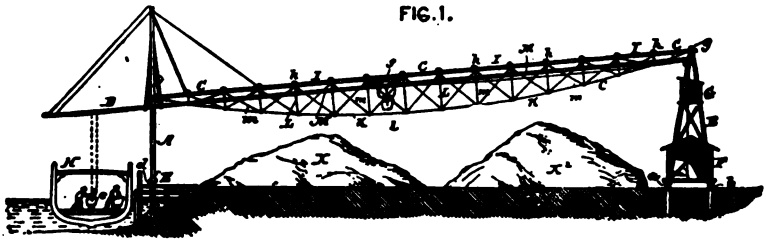
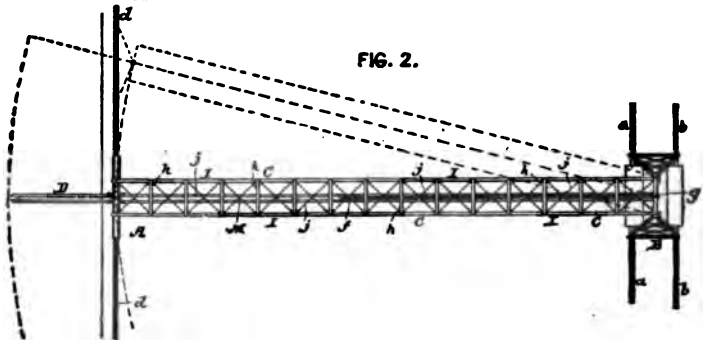


FIG. 2.



"In the drawings, Fig. 1 is a side elevation of a machine made according to my invention. Fig. 2 is a top view of the same. A is the outer, and B the inner, one of the two piers, on top of which are supported the ends of the truss or bridge, C, of the tramway (see Figs. 1 and 2), which, as usual, is supplemented with an apron at D, adapted to extend out over boats to be unloaded at the dock, E. The carriage of the machine and its dumping-bucket, e, are shown on a small scale at f of Figs. 1 and 2. The inner or rear pier, B, is composed, as shown, of a suitable framework, of either iron or wood (in the instance shown, of wood), of sufficient base area to properly rest upon the usual track wheels that run on the rails a, b, and afford a steady support to the inner end of the truss or bridge, C, which, as shown, rests at its rear end on top of the uppermost cross bar or beam of said pier, and is there pivoted (see g, Fig. 2), so that its forward end may vibrate horizontally about such point of pivotal connection to pier, B, in a manner and for purposes to be presently explained. The forward end of bridge, C, is suspended from a sort of ball and socket bearing at the top of the outer pier, A, which, as seen, is composed of an A-frame in such a manner that said bridge or truss, C, at

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its forward end, and the upper end of the said outer pier, are capable of a sort of universal joint movement relatively."

During the 25 years preceding Brown's application for a patent several similar machines had been patented in France and in the United States,—most of them in France, however, in which country the invention of them seems to have been stimulated by the building of the Suez Canal, where such machines were used in connection with dredges for the purpose of hoisting and conveying the earth from the channel to a place of deposit beyond the bank of the canal. Many such patents are exhibited in the proofs. We shall not take space to go through them all. It will be sufficient for the purpose of showing the progress which had been made in such constructions as Brown took in hand when he made his supposed improvement to refer to two or three of them. In 1859 a French patent was issued to Cave and Claparede for a system of apparatus designed for use in digging canals, and in transporting mechanically the earth to the land. Another patent was also issued in that country to the same parties, and in the same year, for (among other things) "transferring loads or earth." These machines were primarily intended for use in making canals, but the inventors say in their résumé that they were not only designed for that use, but, further, for the transportation and unloading "of all loads whatever that it is necessary to unload upon the banks of these rivers and canals, and to transport to certain distances from these banks." Another French patent was one to Gabert and Buette in 1881. This patent, so far as the truss was concerned, was very much like the patents just referred to. It rested upon universal joints,—one on the pier on land, the other on the platform of the vessel,—so that the latter could go forward or backward, or to the right or left; the truss, by means of the joints in its rests, accommodating itself to the movements of the vessel. The trusses in these machines were long structures extending from the vessel from which the load was to be taken beyond the bank to the place of the desired deposit. One end rested upon pulleys turning in a platform (a turntable) pivoted on the vessel. The other end rested upon a like construction oscillating vertically and horizontally, supported by a pier standing on the land. Thus, both ends of the truss rested upon supports provided with a universal joint. It is proper to observe in this connection that the drawings of these French patents show the pier on the land to be located at some distance from that end of the truss; the object being to cast the larger portion of the weight of the truss upon that rest, and thereby, as some of the patents state, give greater strength to the truss in proportion to its material and length. And in the complainant's exhibits, showing their hoisting machines at work upon the docks at Cleveland, we see that the rear piers are advanced from the rear ends of the trusses in the same way as in these French patents. We do not suppose it would be contended that this variation in the location of the pier would take the machine out of the patent so long as the front pier continues to perform its office as a rest for that end of the truss, although its burden might be very considerably diminished. In the United States, among other patents to which our attention has been

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called, was one issued to Frank Murgatroyd, of Cleveland, May 8, 1883, for "mechanism for hoisting and transmitting freight, coal, ore," etc. This patent contemplated substantially the construction of Brown's patent, except that it did not embody joints at the connections between the piers and the truss. There was the same triangular form to one of the piers, and the same provision of tracks, wheels, and trucks for moving the machine over the dock in a direction parallel to the front. For some years previous to Brown's application the Cleveland Rolling-Mill Company had been making extensive use of unpatented machines somewhat similar to Murgatroyd's in unloading ore from vessels lying in front of their dock, and depositing it in localities for storage further back. These machines had also the same or similar provision for moving them along the dock, but there was no articulating or joint connection between the truss and the piers. The connection, however, was made by using flexible sheets of iron or steel in construction in such a way as to admit of moving the pier at one end of the truss a limited distance along its track, the other end remaining stationary, without injuriously straining the material of the truss and piers. The effect of so moving the piers as to carry the truss out of a perpendicular to the tracks under the piers would, of course, involve the drawing over of the top of the pier standing on the single track, as the track would form a tangent to the arc described by that end of the truss when revolved about the other and more stable pier. This, too, as well as the lateral movement, brought some strain upon the truss and piers, but their flexibility was nearly adequate to the need in the practical use of the machine; not quite, however, and the moving of the machine was not quite so easy as when the connections between the truss and piers articulate freely. And we are satisfied that some injury from straining resulted from the more rigid connection, though such injury seems to have been slight. Thus Brown had before him, when he took up the subject of his invention, hoisting and conveying apparatus which had been patented and improved abroad for many years, and which involved the use of a truss, two piers or supports to which it was articulately connected, and trucks and tracks for moving the more stable support along the bank over which the conveying was to be done.

We pass now from these illustrations of the existing art to the invention claimed in the Brown patent. The substance of it consisted in interposing a joint between the truss and the tops of the piers, respectively. A pivot was fixed upon the upper cross-bar of the rear pier, and an opening provided for it in a member of the truss. Upon the upper point of the triangular support at the front end of the truss was constructed a rounded surface upon which a saddle concave on the under side was placed, and upon the saddle the truss was suspended by a strap hanging downward and outward to the upper side members of the frame of the truss; the connection thus formed being similar to the familiar ball and socket joint. This latter connection served the purpose of permitting the truss to turn laterally upon the pier, as well as to permit the tipping or oscillating of the top of the pier inwardly whenever the truss should stand out of a perpendicular

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line to the tracks under the piers. In other words, Brown, perceiving that the rigid connection of the truss with the piers in such machines as that of the Murgatroyd patent and that in the Cleveland Rolling-Mill Company's use was objectionable, removed the objection by substituting articulate devices of the kind employed in the French patents for the flexible connections, upon which he essayed to improve. Upon the basis of this substitution (for he does not, by the language of his claims, at least, found his patent upon the specific forms of articulation provided) he made four claims; the first three of them only being relied upon in the present case, and which are as follows:

"(1) In the combination with the two piers, a bridge pivoted to the upper portions of both of said piers, all substantially as and for the purposes hereinbefore set forth. (2) The combination, with the two piers and a bridge pivoted at one end to one of them, of a universal joint coupling connecting the other end of said bridge and the other pier, all substantially as and for the purposes set forth. (3) The combination, with the bridge, of one pier resting on a double track, another pier resting on one track only (so that it can be tipped toward or from the pier resting on the double track), and couplings or connections between the bridge and piers, which will permit one of the piers to tip, as explained, without in the least straining its couplings to the bridge."

It seems to us very doubtful whether there was patentable invention in this. The need, such as it was, was not obscure; and granting that the remedy was not obvious to the ordinary mechanic, possessed of only the common skill and learning of his profession, yet, to one who was conversant, as Brown is necessarily presumed to have been, with the devices which scientific learning had already given to the world and had employed in this very art, it was not far to seek, and, indeed, was manifest. Assuming, however, that the patentee might have been entitled to claim that the particular devices employed by him were new and patentable, he was not content with this, but made his claims broad and general, covering all forms of the designated means, saying:

"I do not, therefore, wish to be understood as limiting my claims of invention either to the precise form in which any or all of the novel features of construction shown have been carried out by me, or to the use together of all these novel features, but have so fully explained all the parts of my invention, carried out in the best forms now known to me, that those skilled in the art can understand and practice my invention, either in part or in whole, and either in the particular form in which I have so far used it or in some modified form. What I claim is new," etc.

As these means existed in earlier machines, though not exactly in the same form, he was not entitled to make such claims, and they cannot be sustained, without restrictions from the specifications. His invention being not of a primary character, but of special means for accomplishing results which had hitherto been attained by means but little different in their nature, the invention is limited to the particular means provided. McCormick Harvesting Mach. Co. v. Aultman, Miller & Co., 16 C. C. A. 259, 69 Fed. 371; Noonan v. Athletic Club, 39 C. C. A. 426, 99 Fed. 90; Wells v. Curtis, 13 C. C. A. 494, 66 Fed. 318. The broader interpretation of the claims of the patent is the one contended for by counsel for the

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appellant, and, indeed, the necessities of the case require that the claims shall be interpreted thus broadly; for the connection of the truss to the stable pier in the defendant's machine is in the form of a hinge such as is used in hanging doors in which the parts are joined by a vertical pin, and the connection between the truss and the front pier bears no resemblance to the ball and socket hinge of the Brown patent, except that it admits of similar movement, relatively, of that pier and the truss. Specifically, that connection consists of a flat circular plate resting upon a like flat plate, with rims, at the top of the pier. From a bar placed across the top of the upper plate two links descend through an opening in the center of both plates, and are loosely attached below to the truss by a pin through their lower ends. In practice it would seem from the proofs that this link construction admitted all the requisite oscillation of the truss and pier both vertical and lateral, but the capacity of the upper plate to turn horizontally upon the lower supplements the capacity of the links for that motion when more than they can supply is called for. Indeed, this connection of the defendant no more resembles that of Brown than do the connections of truss and pier in the French patents above referred to. If the present invention were generic, and these French machines had been brought out later, it is clear that they would have been infringements. If we were permitted to construe these claims as restricted to the specific means employed by Brown, we might be compelled to the same result; for, the mere bringing together of elements selected from old machines to perform the same functions which they severally performed in the machines from which they were taken, and producing the same result, is not invention. Edge-Setter Co. v. Keith, 139 U. S. 530, 539, 11 Sup. Ct. 621, 35 L. Ed. 261; Campbell Printing-Press & Mfg. Co. v. Duplex Printing-Press Co., 41 C. C. A. 351, 101 Fed. 282.

It was contended for the appellee on the argument at the hearing that the spring in the truss and piers of the apparatus of the Cleveland Rolling-Mill Company and the hinges at the ends of Brown's truss are equivalents, and so that no advance whatever was made by the latter; and, among other cases, Machine Co. v. Dizer, 9 C. C. A. 382, 61 Fed. 102, is cited, where it was held that a spring employed to afford an oscillating movement to a plate with reference to its support was the equivalent of a pivot or hinge used for the purpose of affording the desired oscillation. So, in Stearns & Co. v. Russell, 29 C. C. A. 121, 85 Fed. 218, it was held by this court that a swivel joint which connected one part of a pill-dipping apparatus with another was the equivalent of a flexible tube between the same parts, where, as in that case, they performed the same function. It is not necessary for us to say that that ruling would be applicable to every case of comparison of a spring with a pivot. It would seem that it might not be, for in mechanics they do not always accomplish the result in the same way. It was held by Mr. Justice Curtis in Foster v. Moore, 1 Curt. 279, Fed. Cas. No. 4,978, that the doctrine of mechanical equivalents in connection with the use of a material part of a combination is not confined by the patent law to those elements

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which are strictly known as such in the science of mechanics, but that it embraces these substitutions, which, as a matter of judgment, in construction, may be employed to accomplish the same end. But, at all events, the spring and the hinge, when used to change the angle of connected parts, are means so nearly identical, and their uses so familiar to every workman, that the selection of the one or the other means of securing the desired result could hardly be regarded as more than the exercise of common skill.

Nor was there anything patentable in the choice of a ball and socket hinge for the connection of the front pier. If the need was of the properties of a universal hinge, the ball and socket would be at once suggested. The case of L. Schreiber & Sons Co. v. Grimm, 19 C. C. A. 67, 72 Fed. 671, decided by this court, is very much in point. We there held that the introduction of a ball and socket joint between the saddle and the seat of a beer cask for the purpose of affording oscillatory motion to the saddle was not invention, for the reason that the requirement furnished a plain suggestion of a means familiar to the craft of mechanics. The decree of the circuit court is affirmed.

(107 Fed. 505.)

DAVEY PEGGING MACH. CO. v. ISAAC PROUTY & CO. et al.

(Circuit Court of Appeals, First Circuit. February 9, 1901.)

No. 316.

1. PATENTS—INFRINGEMENT.

Wherever patentability of a device turns on the application to some particular purpose of an element used generally throughout the arts, although the patent issues for the device, and not for the process, product, or result, and if, also, the invention is of a limited or low order, the patent must be restricted, so far as an alleged infringement is concerned, to the express purpose pointed out by the inventor. Electric Co. v. La Rue, 11 Sup. Ct. 670, 139 U. S. 601, 35 L. Ed. 294, U. S. v. Berdan Fire-Arms Mfg. Co., 15 Sup. Ct. 420, 156 U. S. 552, 39 L. Ed. 530, and Watson v. Stevens, 2 C. C. A. 500, 51 Fed. 757, applied.

2. SAME—VALIDITY AND INFRINGEMENT—PEGGING MACHINES.

The Davey patent, No. 555,434, for an improvement in pegging machines, the essential feature of which is a reduction in size of the horn tip used in such machines to support the work during the pegging operation, so as to enable it to enter far enough into shoes having pointed or small toes to do effective work therein, while describing a machine which consists of a combination of well-known elements, discloses patentable invention, in that it accomplished successfully what prior inventions had failed to accomplish; but, so construed, it is not infringed by a machine which contains substantially the same elements, arranged to accomplish the cutting of the pegs, as well as driving them, and without regard to reduction in size of the horn tip.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

For opinion below, see 96 Fed. 336.

Frederick P. Fish and William K. Richardson, for appellant.

Louis W. Southgate, for appellees.

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Before PUTNAM, Circuit Judge, and WEBB and ALDRICH, District Judges.

PUTNAM, Circuit Judge. This appeal grows out of the alleged infringement of claims 1, 2, 3, and 10 of the patent issued to John F. Davey on February 25, 1896, No. 555,434. These claims are as follows:

"(1) A work support for pegging machines, comprising a horn tip provided with a supporting annulus, combined with a button having a shank contained within said annulus, and a supporting portion resting on said annulus, said button being provided with external gear teeth in a portion of its surface in bearing engagement with said annulus, substantially as and for the purpose described.

"(2) The combination of the rotatable horn of a pegging machine with a work-supporting button pivotally supported in the tip thereof, and provided with an eccentric awl passage and means of preventing rotation of the button when the horn is turned, substantially as and for the purpose described.

"(3) The combination of the rotatable horn of a pegging machine with a work-supporting button pivotally supported in the tip thereof, and provided with an eccentric awl passage and a slot extending laterally therefrom through and to the other side of the axis of the button, and means for preventing rotation of the button when the horn is turned, substantially as and for the purpose described."

"(10) The combination of the horn adapted to rotate upon a vertical axis, provided at its tip with a supporting annulus concentric with its axis of rotation, with a button supported by said annulus, and provided with an eccentric awl passage within the opening of the annulus, and means for preventing rotation of the button when the horn is turned, substantially as and for the purpose described."

To understand the issues, it is necessary to examine the invention critically. It concerns only driving the peg, and makes no provision for cutting its end. The art is a subdivision of that of pegging without maintaining the last in the shoe during the operation. It cannot be doubted that it is useful. The record shows that various devices had been attempted for the same purpose unsuccessfully, all of them, however, making use of a support for the mechanism, a so-called "horn," which enters the shoe, the horn tip, and some method of adjusting the rotation of the tip with reference to the rotation of the rest of the machine, as the tip is moved from point to point. No invention is claimed by Davey to arise out of any of these elements except the tip. As will be seen by the specification, his invention relies on improvements in details, meeting from point to point defects in previous devices, so that, as the result of several improvements co-acting together, a satisfactory tip was produced.

This case relates to the tip in its simpler form, as devised for driving a single line of pegs. In order to use it for additional lines, Davey made some modifications which may be regarded as a separate thought or invention, to which we have no further occasion to refer.

The main difficulty dealt with by Davey which the specification points out was to construct horn tips capable of entering far enough into the toe of the shoe. A second difficulty was due to the projection of the ends of the driven pegs through the inner sole; and

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it was also stated that it is desirable to permit the awl to run below the work support, so that the length of the awl stroke need not be varied in passing from thick to thin material. In order to overcome the first difficulty named, Davey undertook to reduce to a minimum the height and diameter of the horn tip. This case has nothing to do with the second difficulty. To meet the last, he supported that part of the horn tip which he calls the "button," which is in fact the anvil, on a ring which he calls an "annulus," and he gave the button a hollow shank, thus permitting the awl and the peg to be driven through and through, without any obstruction, in a vertical direction.

As to the reduction of the dimensions of the horn tip, the specification refers to the fact that, after the awl is driven, the material is necessarily fed forward a distance equal to that between two adjacent pegs, in order to receive a new peg. It says that, in prior machines, the work was pierced by the awl at a hole in the button co-axial with the horn tip. Thus, of course, the diameter of the tip was at least twice as large as the feed. The specification then points out that in Davey's device the hole where the awl pierces the work is eccentric to the axis of the button, "being," as it says, "set to one side of the axis a distance about equal to one-half the normal feed." It continues that the awl hole formed in the material passes across the center, and at the end of the movement is eccentric on the other side of the axis from the point at which it was made, so that the diameter, instead of the radius of the button, need be only large enough to accommodate the feed. "Thus, other things being equal, the button, having an eccentric awl passage in accordance with the present invention, may be much smaller than those heretofore made, having a concentric awl passage." It closes: "By this and other features of construction hereinafter described, the horn tip and work support, forming the subject of the present invention, are made sufficiently compact to peg properly around the toe portion of a boot or shoe."

The button is constructed with a supporting shoulder, passing longitudinally around its entire circumference, which rests on the so-called "annulus," on which it rotates. What is thus termed an "annulus" is an ordinary rim, found everywhere in the mechanical and domestic arts. The extension of the button below the shoulder constitutes what is called the "shank." This is merely a hollow cylindrical extension, such as is found in the arts wherever it is desired to support any cylindrical utensil by a rim, if there is no occasion that the bottom of the utensil be closed in. This construction, of course, permits the awl to be driven through the awl passage in the button, and through and through, without meeting any obstruction below; thus rendering it unnecessary to vary the awl stroke in passing from thick to thin material,—all of which has been referred to in the portions of the specification which we have cited. In addition thereto, the button is provided with the geared teeth of claim 1, engaging with the rotating device, common in mechanisms of this character, as we have already said.

We think the references we have made to the specification render

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it clear that, while it was claimed at bar in behalf of the complainant that Davey's invention covers an eccentric awl passage broadly, yet his idea could not thus have been accomplished. A merely eccentric awl passage, or a passage which has no relation to the point where the feed stops, could be secured though the feed crossed only the radius of the button, which would have been wholly inconsistent with Davey's expressed purpose. Nothing in the case shows that to have commenced near the circumference, and to have fed only to the center, would have accomplished anything, so far as concerns Davey, which would not have been equally secured by commencing, as prior devices did, at the center and feeding to the circumference.

Moreover, the extracts which we have made from the specification expressly require that the feed shall cross the center of the button, and that the end of the feed movement shall be eccentric on the other side of that center from the point at which the awl hole was made. They do not state the precise place where the feed shall terminate, but they contain enough to demonstrate that our construction of the patent in this particular is correct. We refer especially to the statement that the awl hole is set to one side of the axis "a distance about equal to one-half the normal feed." So it follows mathematically that, in order to accomplish the entire feed, the distance between the termini must be about equal to the diameter of the button. In speaking of the "slot," which is necessarily co-terminal with the feed, the specification is exact, describing it as "a slot extending from said awl passage across the axis of the button to a point equally eccentric at the other side." Indeed, it is only on this construction that it is possible to maintain Davey's purpose, expressly given in the specification, to the effect that "the diameter, instead of the radius, of the button, as heretofore, need be only large enough to accommodate the feed of the material." The same line of reasoning defeats the proposition, made at bar, that utilization of the entire diameter of the button for any purpose or purposes whatever would be within Davey's idea. Our extracts from the specification make it clear that his proposition was to utilize the diameter of the button for a particular purpose,—that is, for the feed of the awl,—and for nothing else. On the whole, it is the reasonable, and the only fair, construction to be deduced from careful examination of the specification and claims that Davey's idea was the eccentric placing of the awl hole in such way as to secure a feed across the diameter of the button, and to thus secure a corresponding reduction of the horn tip, in order to penetrate the shoe, as already pointed out.

Without going into detail, the specification shows clearly enough that the peculiar location and construction of the gear teeth, especially referred to in claim 1, serve to reduce the horn tip perpendicularly. Therefore this element also relates to diminishing the horn tip, so that it can successfully penetrate into the extremities of boots and shoes for the general purposes to which the patent appertains. Thus, his device was adapted for use in doing fine work with a narrow toe, and it had no particular relation to the coarse

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boot or shoe, with a broad toe, in which a tip of unreduced size can be worked without difficulty.

The respondents' device not only drives the peg, but it automatically cuts off its end. Davey lays this aside in the following reference in his specification to the difficulty created by the ends of the driven pegs:

"Attempts have been made to overcome this latter difficulty by providing a horn tip, or work support, with devices intended to cut off or cripple the projecting ends of the pegs after they have been driven, and during the feed of the material in the pegging operation."

There is a serious question whether the various claims in issue cover the pith of Davey's invention, and whether each of them is not of such fragmentary character that it is doubtful whether it can be held to cover any patentable subject-matter. However, the patentee maintains that each claim includes the substance of the entire device; and inasmuch as this proposition is not wholly unreasonable, and may perhaps be sustained on a thorough investigation of all the matters which bear upon the construction of the various claims, and inasmuch, further, as it does not become necessary that we should determine this question, we proceed with the case as though this contention was established. We are also of opinion that Davey's device contained patentable invention, and, for reasons which we will state later, we regard it as quite analogous to those in Watson v. Stevens, 2 C. C. A. 500, 51 Fed. 757, and in Consolidated Car-Heating Co. v. West End St. Ry. Co., 29 C. C. A. 386, 85 Fed. 662. A somewhat fuller statement of the reasons why the car heater involved in the latter case was held to contain patentable invention may be found in the same suit as reported in the circuit court under the title of Consolidated Car-Heating Co. v. American Electric Heating Corp. (C. C.) 82 Fed. 993. Another device of analogous character was held by us to be patentable in Gaslighting Co. v. Fuller, 8 C. C. A. 442, 59 Fed. 1003. Therefore the only question which we have to consider is that of infringement, and as to this we must be governed by the peculiar nature of the invention, which we hold to be of the class covered by the cases cited.

The respondents locate their awl passage eccentrically, but, unlike Davey, they drive the peg within the radius of the button. Again, unlike Davey, they have no purpose of accomplishing, and they do not accomplish, a reduction of size. So much of the diameter of the button as is not used for the awl feed they apply to a mechanism for cutting pegs. So far as the peg-driving feed is concerned, they differ from what preceded Davey only in moving from the circumference towards the center instead of from the center towards the circumference,—a change which clearly is ordinarily within the common right. While Davey's device is available for fine work, respondents' is so only for coarse; and while the former concerns only driving, the latter provides both for driving pegs and cutting off their ends inside of the sole. To hold that the respondents cannot use so much of the diameter as lies on the other side of the axis from the awl feed, for such purposes, would plainly obstruct invention instead of encouraging it.

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In view of the facts that the respondents' device thus accomplishes a substantially different result from the complainant's, and has a substantial function which the latter does not possess, and for which it was not intended, and that, also, the latter can do the fine work for which the former is not adapted, the remark made in the opinion of Judge Hawley, given in behalf of the circuit court of appeals for the Ninth circuit, in Norton v. Jensen, 1 C. C. A. 452, 464, 49 Fed. 859, 875, seems pertinent: "It would be a perversion of the law to hold a machine which can do certain kinds of work to be an infringement of a patent for a different machine, which cannot do the same work." It is true, ordinarily, that the mere fact that a machine effects better results than the patented device, or that a patented device is applied to purposes not foreseen by the patentee, does not relieve against the charge of infringement; but in U. S. v. Berdan Firearms Mfg. Co., 156 U. S. 552, 565, 15 Sup. Ct. 420, 424, 39 L. Ed. 530, 534, it appeared that the patent there in issue was for a combination no single element of which was new; that the device was intended for use with rim-fire cartridges, but was not successful when used with center-fire cartridges; that the United States, who were alleged to have infringed, used only the latter cartridges; and that, in order to adapt the patented device to these cartridges, a new element was added, which was not covered by any patent. The court held that there was no infringement, and observed:

"For where several elements, no one of which is novel, are united in a combination which is the subject of a patent, and these several elements are thereafter united with another element into a new combination, and this new combination performs a work which the patented combination could not, there is no infringement."

There is, moreover, a class of cases to which we cannot broadly apply the rule that results which may be gained by a device are protected although not foreseen by the patentee; in other words, cases in which the rule of "double use," as it is often called, does not apply in behalf of the inventor. Those which we have cited and that at bar are of this class. They all turn on the fact that, under peculiar circumstances, the application to some particular purpose of an element used generally throughout the arts, or an improvement in various details as in the present case, amounts to invention, on account of the particular end accomplished, although the patent issues for the device, and not for the process, product, or result. Ordinarily, such inventions are of a limited or low order, and must be restricted to the express purposes pointed out by the inventor, or they obstruct the advance of the beneficial arts, rather than assist it. The adaptation of a torsional spring was discussed in Electric Co. v. La Rue, 139 U. S. 601, 11 Sup. Ct. 670, 35 L. Ed. 294. The torsional spring had been used largely in the arts, yet its particular adaptation to a telegraph key was protected. The court said, at page 606, 139 U. S., page 672, 11 Sup. Ct., and page 296, 35 L. Ed., that a like use, "for purposes which differ principally in name," would infringe, but it is impossible to hold otherwise than that the patent was limited to the result which the patentee ex-

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pressly pointed out. So, in Watson v. Stevens, already referred to, the use of rotating dies in lieu of reciprocating dies, one being strictly the equivalent of the other, was protected in the art of making shank stiffeners. That was the use which the patentee had pointed out in his patent, and, under the peculiar circumstances of the case, although the mere change of rotating dies for reciprocating dies would not be protected, it was held that the patentee's device covered invention. It would have been impossible, however, to have broadened out the patent to cover the use of rotating dies for cutting out any other blanks than shank stiffeners. So, in Consolidated Car-Heating Co. v. West End St. Ry. Co., Judge Aldrich, speaking in behalf of the court, at page 389, 29 C. C. A., and page 664, 85 Fed., dwells constantly on the use to which the detailed improvements combined in the patentee's device were applied,—that is, to heating street-railway cars,—and he said: "Looking at the general use, the substantial results accomplished through the mechanical arrangement of the device described," etc. In view of what was said in that case, it would be impossible to hold that the combination patented there covered a patentable invention, except in connection with the specific use to which the patentee in his specification applied it. So, in Electric Gaslighting Co. v. Fuller, the opinion of the court closed, at page 444, 8 C. C. A., and page 1005, 59 Fed., as follows:

"Looking at Tirrell's improvement in issue here from this point of view, it consists of mechanical details, accomplishing a useful result, but of a low order; and the mechanical details of respondents' devices are different, in the sense of the patent law, and accomplish a result also in a large part different, and cannot be held to infringe."

While the particular letter of this paragraph may not apply accurately to any case except that then under consideration, yet it states the underlying principle which forbids us from shutting out, in the interest of Davey's patent, a device like that of the respondents which combines elements Davey did not combine, and accomplishes results he did not seek to accomplish, and which cannot accomplish those to which his patent particularly relates. Therefore it follows that, while the complainant has a title to old elements as combined in his particular device to accomplish certain special results, the respondents have an equal right to avail themselves of all the same elements in their particular device to accomplish other special results, so long as it is apparent, as is the fact in the case at bar, that what they did could not justly be held to be an intended piracy under the color of apparent differences. The court below properly dismissed the bill. The decree of the court below is affirmed, and the costs of appeal are awarded to the appellees.

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(107 Fed. 511.)

HAGAR et al. v. ELMSLIE.

(Circuit Court of Appeals, Third Circuit. March 4, 1901.)

No. 34.

1. SHIPPING—DEMURRAGE—DELAY DUE TO NEGLIGENCE OF CHARTERERS.
Where charterers neglected to advise their agents at the port of destination of their agreement to attend to the entering of the ship at the custom house upon her arrival, by reason of which such agents refused to act, and a delay of three days was caused in having the ship entered, the owners were entitled to include such days in the lay days allowed by the charter for discharging.[1]

2. SAME—SUIT FOR DEMURRAGE—DEFENSES.
A provision of a charter allowing the charterer a certain number of lay days for loading and discharging, and requiring the payment of demurrage for any additional time taken, is an absolute and unconditional engagement on the part of the charterer, who cannot be relieved therefrom except on the ground that the delay was due to the fault or negligence of the owner, or those for whom he is responsible; and such fault or negligence is an affirmative defense in a suit to recover the stipulated demurrage, the burden of pleading and proving which rests upon the charterer.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

Horace L. Cheyney, for appellants.
J. Rodman Paul, for appellee.

Before DALLAS and GRAY, Circuit Judges, and BRADFORD, District Judge.

GRAY, Circuit Judge. This is an appeal from the district court of the United States for the Eastern district of Pennsylvania in a cause of contract, civil and maritime. 101 Fed. 840. The action arose out of a charter party of the bark Banklands, of which the appellee was the managing owner, and the appellants were the charterers, for a voyage from Philadelphia and New York to Rio de Janeiro. Under that charter party the vessel loaded a general cargo, consisting of locomotives, car materials, case oil, resin, lumber, etc. The provisions relevant to the present case are the following:

"It is agreed that the lay days shall be as follows (if not sooner dispatched), commencing from the time the vessel is ready to receive cargo: 65 running days, Sundays excepted, for loading and discharging; * * * and that for each and every day's detention by default of the said [charterers] or agent $65.85 United States gold dollars per day, day by day, shall be paid by said [charterers] or agent. * * * The cargo to be received and delivered alongside, within reach of the vessel's tackle, free of lighterage to vessel." "Vessel to be consigned to charterers' agents at Rio free of commission for doing the vessel's inward business."

The claim of the libelants embraced the following three items: (1) Customs agency fee at Rio; (2) lighterage of cargo at Rio; (3)

[1] Demurrage, see note to Randall v. Sprague, 21 C. C. A. 337.

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demurrage there incurred. In regard to the first two items, the court below said:

"The charge for lighterage is admitted, and need not be further considered. A credit, however, must be allowed thereon for the money received by the master as a present from the owner of the lighters. The item for commission is too large. The sum paid to the broker by the master was for doing all the ship's business at Rio, and not merely for doing her inward business. The respondents were only liable for one-half of this item."

As the judge, in our opinion, was clearly right in the disposition made of these items, they need not further occupy our attention. The principal question is that arising out of the claim for demurrage. In addition to the provision as to lay days and demurrage, already quoted from the charter party, which was dated December 28, 1894, a subsequent agreement as to the same matters was entered into between the parties by the following letter from the appellants to the appellee's agent in New York, dated January 5, 1895, the date at which the charter party was signed:

"We sign inclosed c/p with understanding that the clause, 'General average, if any, to be settled according to York-Antwerp rules of 1890,' not binding in case shippers object to it. Also for discharging at Rio as agreed by captain regarding the days for car material and locomotives, viz. he to serve notice on each lot, and lay days to count as one lot.

Viz. 35 days locos. } to count as 35."
6 to 10 " car. }

On February 18, 1895, a second agreement was made by the shippers with the master of the Banklands in writing, as follows:

"We refer to your charter party, dated December 28th, 1894, in which it is stipulated that your vessel is to be loaded and discharged in sixty-five running days, Sundays excepted; and in consideration of your having indorsed on bills of lading a clause allowing the consignees thirty running days, Sundays excepted, with a letter allowing five more, if required, for discharging the locomotives, and six like days for discharging car material,—in all, forty-one days for these two lots of goods,—I agree that if the number of lay days left after completion of loading, over and above the forty-one, be not sufficient to discharge the other cargo, I will pay demurrage here as per charter party for any and all days used over and above the sixty-five days stipulated in charter."

On February 19, 1895, when the vessel was loaded, it was further agreed between the shipper and master as follows:

"We agree that twenty-three running days (23) have been used in loading Br. Bk. Banklands under charter dated December 28th, 1894, leaving forty-two (42) running days, Sundays excepted, for discharging the vessel at Rio de Janeiro."

In discussing these various stipulations, the learned judge of the court below says:

"But the parties have treated the agreement of January 5th, concerning notice, as modifying the apparently contradictory agreement of February 18th, so as to allow for discharge of the locomotives and car material 35 days instead of 41. Accepting this construction, the final result appears to be that the ship would have at least 7 days to unload the general cargo, and might have more. In fact, she had 5 days more, making 12 in all; for the consignees of the locomotives, who were themselves to unload this part of the cargo, used only 30 days in so doing. The single question, therefore, to be considered, is whether the libelants' claim for an additional 13 days should be allowed. Only 8 of these days were actually occupied in unloading cargo, the charge for the remaining 5 arising under the following circumstances: The ship arrived at Rio on Saturday, March 23d, and on the morning of that day

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the master called upon the respondents' agents, in order to have his inward customs business attended to. This visit was in accordance with instructions received from the respondents before the ship sailed from New York, but by some oversight the agents had not been notified of the instructions, and declined to act. They recommended the captain to apply to another firm of brokers, to whom he had also received a letter of introduction from the respondents. At the office of this firm he found that the principal was absent, and could not be seen before Tuesday; Monday being a holiday, when no business would be done. On Tuesday the firm refused to enter the vessel, and the captain thereupon employed another broker, who finally undertook the ship's business. The vessel was entered at the custom house on the same day, and the next two days were employed by the master in making arrangements to unload the vessel by lighters; this course being necessary, owing to the regulations of the port that were then in force. On Wednesday the consignees of the general cargo were notified that the ship was prepared to deliver, but, as such consignees are allowed from one to two days' notice by the custom of the port, actual delivery could not be begun before March 29th. These 5 days—March 23d to 28th, inclusive, Sunday excepted—form part of the libelant's claim. I think 3 of them should be allowed. The respondents were at fault for failing to notify their agents at Rio of the instructions communicated to the captain at New York. If such instructions had been given, no reason is apparent why the ship could not have been entered on Saturday, and every arrangement made to begin discharging on Tuesday. The lay days would then have begun on Tuesday, March 26th, and I think they should now be counted from that date."

Agreeing with the learned judge in the view thus stated by him, we have only to consider the remaining question as to the allowance of the eight additional days for demurrage. As to these his opinion is as follows:

"Upon this point, I think the respondents are required to prove that these days were not reasonably necessary to discharge the general cargo, taking into account the conditions of the port, the facilities for doing the work, the quality of labor available, the manner in which the cargo was stowed, and the difficulties in getting at the merchandise in the hold. Without reviewing the facts, it is enough to say that I have come to the conclusion that the time occupied by the ship was not unreasonable, and that these eight days also constitute a proper claim."

This brings to our attention the single question of law raised in this case, and that is whether the burden rested upon the appellants to prove that the delay of eight days in unloading the ship at Rio, over and above the lay days stipulated for in the charter party and subsidiary contracts, was due to any negligence or default of the shipowner, or those for whom he is responsible,—in this case, the master, officers, and crew of the ship. It is universally held that a stipulation in a contract prescribing a time within which an act or thing is to be done or performed by one of the parties thereto, made in unqualified terms (time being of its essence), is absolute in its obligation, and cannot be excused or avoided by the party bound, by reason of any obstacle or impediment to performance, no matter how beyond the control of such party the existence of such obstacle or impediment may be. The one who makes such an absolute and unqualified stipulation must stand the consequences of his voluntary act, and he will be held by the law of the contract to a strict observance of its terms, even if it becomes impossible of performance from any other cause than that of the conduct of the other party to the contract. It is manifest that, if

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the default or negligence of the other party to the contract prevent or interfere with the performance, the obligation to such party is dissolved, but no matter or thing for which such other party is not responsible can work such dissolution. This is the common law as to contracts generally, and it has been laid down "as firmly established, both by decided cases and on principle, that when a party has either expressly or impliedly undertaken, without any qualification, to do anything, and does not do it, he must make compensation in damages, though the performance was rendered impracticable by some unforeseen cause over which he had no control." Ford v. Cotesworth, L. R. 4 Q. B. 134; Leake, Cont. 693. In charter parties and contracts of affreightment the doctrine here stated is fully recognized. Thus, in Scrutton, Charter Parties, § 23, it is said:

"If by the terms of the charter the charterer has agreed to load or unload within a fixed period of time, that is an absolute and unconditional engagement, for the nonperformance of which he is answerable, whatever be the nature of the impediments which prevent him from performing it, unless such impediments are covered by exceptions in the charter or arise from the shipowner's default. Thus, after the ship is ready to load or to unload, the charterer will not, in the absence of express exceptions, be released from his contract by delay resulting from the crowded state of the docks, bad weather, or ice preventing loading, insufficient supply of cargo, or lawful orders of the authorities at a foreign port."

That the author correctly states the result of the authorities will be apparent by a reference to the cases referred to by the appellee: Davis v. Pendergast, 16 Blatchf. 565, Fed. Cas. No. 3,647; Burrill v. Crossman, 16 C. C. A. 381, 69 Fed. 747; 1,600 Tons of Nitrate of Soda v. McLeod, 10 C. C. A. 115, 61 Fed. 849; Snow v. 350 Tons of Mahogany (D. C.) 46 Fed. 129.

We do not understand the counsel for the appellants to dispute the law in this respect, but they contend that, where it is alleged that the delay was caused by the ship or the master, the burden of proof in this respect is not cast upon the charterer. It must, however, be held that where a stipulation, without qualification, condition, or exception stated therein, is in question, and an excuse for performance recognized by law, though not stated in terms in the contract itself, is relied upon, it must be pleaded in some form, and, as an affirmative plea, must be proved by the party offering it. The philosophy of all systems of pleading requires this. Such an excuse is not by implication embodied in the terms of the contract, as a limitation thereto, and, indeed, could not be, as it goes to the destruction of the contractual obligation. If the onus probandi is not upon such a party, upon whom does it rest? Certainly it ought not to rest upon the party in whose favor an absolute contract is made, containing no exception or qualification, and who has proved that the terms of the contract as written have been broken. In the case in hand the time stipulation for loading and unloading is explicit and unqualified. A number of days allowed for performing the work was absolutely fixed by the agreement of parties. The proof offered by the libelant as to the number of days occupied, over and above the number stipulated for, is clear and uncontradicted, and he is not required to go further. The single excuse

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available in law, arising from the conduct of those for whom the other parties to the contract are responsible, must be pleaded, and, of course, proved. The court was clearly right in its determination in this regard.

As to the findings of fact by the court below in regard to this plea, we are disposed to accept the same, unless very strong reasons are shown for our not doing so. A careful examination of the testimony on both sides has not convinced us that the court below was wrong in its finding. The testimony offered by the respondents below (the appellants here) was principally that of stevedores in Philadelphia and New York, who were of the opinion that the ship could have been unloaded at Rio Janeiro in less time than was actually taken in doing so. They were not, however, familiar with the conditions existing in the harbor of Rio, or with any of the surroundings that admittedly might affect the progress of the work of unloading. Their testimony was in the nature of that of experts not fully qualified to testify in the particular case. So, also, as to the testimony of the captain of a ship, who had had experience in unloading in the port of Rio; while better qualified to speak, he still confined his testimony carefully to what could be done on his own ship and with his own crew. It is entitled to some weight, but it is not conclusive, even taken in connection with the other evidence in the case, such as the disparity in the number of barrels of resin, or of cases of chairs, unloaded on different days; the ship's log showing, for instance, 222 barrels one day, and only 54 the next, etc. While, in our opinion, the weight of testimony on either side was closely balanced, the effect of it is not such as to constrain us to reverse the findings of fact made by the learned judge of the court below. The decree of the court below is affirmed.

(107 Fed. 533.)

THE TRANSFER NO. 9.

THE WILLIAM J. SEWELL.

(Circuit Court of Appeals, Second Circuit. February 27, 1901.)

No. 76.

COLLISION—STEAM VESSELS MEETING IN CHANNEL—SIMULTANEOUS PASSING OF TWO VESSELS.

A transfer tug passing down East river with a car float on either side *held* in fault for a collision with a schooner coming up in tow, which occurred as she was rounding Horn's Hook between the shore and the center of the channel, on the ground that, being in a position where careful navigation was required, owing to the number of vessels passing and the flood tide, after having agreed to allow the tug and schooner to pass ahead of her, she also assented to the signal of another tug coming up nearby, abreast of the schooner, with a tow on each side, to permit the latter to pass across her stern, and thereby placed herself in a situation where she was unable to avoid collision with one of the two passing vessels.

Appeal from the District Court of the United States for the Southern District of New York.

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This cause comes here upon appeals from a decree of the district court, Southern district of New York, holding the steam tug Transfer No. 9 solely in fault for a collision between a car float lashed to her port side and the schooner Viking in tow of the William J. Sewell. The facts appear in the opinion.

Henry W. Taft, for the Transfer No. 9.
Frank D. Sturges, for libelant.
Le Roy S. Gove, for appellee.

Before WALLACE and LACOMBE, Circuit Judges.

LACOMBE, Circuit Judge. The accident happened about 10 a. m., August 24, 1899. The Sewell, with the Viking in tow on a hawser of about 40 fathoms, was going up the East river, on a flood tide, near the middle of the channel on the west side of Blackwell's Island, bound through Hell Gate. When she reached Eighty-Second street the Sewell sounded the long, bend-warning signal for Horn's Hook, which is at the foot of Eighty-Ninth street. No answer was received to it. When about off Eighty-Fourth street the steam tug R. S. Carter, with a schooner in tow on a hawser of 25 fathoms, was seen south of Mill Rock and in the Gate going towards Astoria, heading for the east channel (i. e. the channel to the east of Blackwell's Island). The Carter blew two whistles to the Sewell, to which the latter replied with two. When about abreast of Eighty-Sixth street, still in the middle of the channel, the captain of the Sewell noticed the bows of two car floats coming out of Horn's Hook, lashed to Transfer No. 9. He at once blew her one whistle, to which she replied with one. While running thus through the west channel, the Sewell had overtaken another flotilla, consisting of the steam tug Harlem River No. 2 with a coal boat in tow on each side, which was nearer the New York shore (within 150 feet of it) bound for Harlem river. When about abreast of Eighty-Second street the captain of Harlem River No. 2 heard a long whistle from above the Hook, and himself sounded a long one as a warning to boats above the Hook that he was bound up. When No. 2 reached Eighty-Sixth street, the pilot perceived Transfer No. 9, to which he blew two whistles, receiving two whistles in reply. Transfer No. 9 had come down the middle of the Harlem river. When off Ninety-Second street she encountered Transfer No. 11, a sister tug belonging to the same claimant, bound up, which passed between No. 9 and Mill Rock. No. 9 stopped her engines to allow No. 11 to pass, her headway taking her nearer to the New York shore. She then starboarded her wheel and went ahead under one bell to come out to the point of Horn's Hook, intending to cross from that point to the east channel. She blew the long, bend-warning signal, but heard neither of those blown by the Sewell and No. 2, nor was her own heard by the Sewell. This sometimes happens in that locality, when the downward bound boat is well in towards the New York shore. No. 9 went out beyond Horn's Hook under one bell, and as soon as it was possible to see down the west channel her lookout on the bow of the car float reported to her captain

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that a tugboat with a schooner was coming up the river. The captain immediately stopped No. 9's engines, and the whistles with the Sewell were exchanged. Shortly after the two-blast signal of Harlem River No. 2 was heard and responded to, whereupon No. 2 hauled in towards the New York shore, and No. 9 went ahead under one bell two or three turns to get headway enough to allow room for No. 2 to pass between her and the Hook. In doing so No. 9 brought her stern out into the river, as she admits, about 200 feet beyond the Hook. The Sewell proceeded on her course, and passed ahead of No. 9, clearing her by a space which her captain estimates at 350 feet, and the captain of No. 9 at 75 feet. Being apprehensive that the Viking, under the action of the tide, would swing into him, the captain of No. 9 began to back, and continued doing so until No. 2 blew alarm whistles to prevent No. 9 backing into her starboard boat. The collision occurred just as No. 9 stopped backing, the tide swinging the bows of her port float against the Viking's port quarter. The location of this collision is one where it is difficult to navigate. To the south there are the two channels on either side of Blackwell's Island, to the north the Harlem River and the Gate on either side of Mill Rock. The obscuration of vision caused by Horn's Hook, the uncertainty of hearing whistles across it, the presence of Flood Rock, the various eddies and swirls produced by a three-mile tide, coupled with the fact that it is frequently filled with vessels proceeding up, down, and across, require the most careful navigation on the part of all who undertake to pass through there. In such a location the initial fault which brings about a situation of peril is much more serious than it would be in waters where there is a better chance for escaping from such situation by subsequent maneuvers. When one such fault, clearly established, is found to have precipitated the peril, the court will give much weight to any reasonable excuse offered by one of the other vessels for not undertaking some maneuver which might have avoided the catastrophe.

From the above statement it is self-evident that, except for Harlem River No. 2, the other boats would have dealt with the situation easily and safely. Had No. 9 stayed where she was when she stopped her engines, or moved out only far enough to avoid the effect of tide and eddy, the Sewell and the Viking would have passed with a broad margin of safety. A situation of safety was turned into a situation of peril when an agreement was made which necessitated the reduction of that margin. As the proposer of that agreement, Harlem River No. 2 was primarily in fault, and, were it included in this suit, should be held liable. Its master was aware of the exact situation, he had heard the exchange of signals which called upon the Sewell to proceed across the bows of No. 9, and he should have waited where he was, stopped, or backed, until the Viking had passed No. 9, before insisting that No. 9 should move out nearer to the line of the tug and schooner. No. 2 was the privileged vessel, ordinarily entitled to pass No. 9 under its stern, and to require its co-operation to such navigation; but the Sewell was also privileged, and had already availed of its privilege to lay

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out a plan of navigation which it was improper for No. 2 to undertake to interfere with. But No. 2 is not here, so her faults need be no further considered. The district judge held No. 9 in fault, finding that it was "unjustifiable navigation to keep near the New York shore under Horn's Hook, obscured from view of vessels below, and where signals, though given, are often not heard, instead of coming down further out in the river, as may easily be done, where the dangers may be seen in time to avoid them." While we concur in the conclusion that it is imprudent to keep so near the New York shore, we are not prepared to hold that it can in no case be justified, and are satisfied that on this occasion it should not be charged against No. 9 as a fault. There is no reference in the opinion to the circumstances under which she found herself so near the shore. She had about reached Ninety-Second street when she received a signal of one whistle from Transfer No. 11, a railroad tug, bound up the river with a car float on each side. No. 11 came around the Hook rather close to shore, which it seems is the usual course for that sort of flotilla on a flood tide, to avoid risk of being carried up to Flood Rock. No. 11 passed between No. 9 and Mill Rock, while at the same time a tug and schooner bound down (apparently the R. S. Carter) passed between No. 11 and Mill Rock. The captain of No. 9 stopped her engines to let No. 11 pass, because the tide would sweep the latter vessel in, and he did not wish to embarrass her. She passed within 50 feet. By that time No. 9's headway had carried her pretty close inshore, in the belly of the cove and behind Horn's Hook. For these reasons we are not inclined to hold No. 9 in fault for getting into that position, nor for her subsequent navigation down to the time when Harlem River No. 2 was seen, which seems to have been prudent and cautious. We are of the opinion, however, that she was clearly in fault for assenting to the suggestion of No. 2, and agreeing to change the situation of safety for one of peril, by undertaking, in so difficult a location, to aid one flotilla to cross her bows, and at the same time aid another one to pass under her stern. Although she was the burdened vessel, having both flotillas on her starboard hand, she was under no obligation to assent to No. 2's proposal. The agreement with the Sewell constituted a special circumstance, which entitled her to reject the proposed additional agreement by blowing alarm whistles. Her master's excuse is that he thought there was room for the schooner to pass, even if he should move out far enough to let No. 2 pass inshore of him. He miscalculated, and, since the maneuver he voluntarily undertook manifestly involved risk of collision, his vessel must be held responsible for the catastrophe which such maneuver brought about.

It is urged that the captain of the Sewell ought to have ported strongly, to have gone further to the eastward, when he heard the exchange of signals between No. 9 and No. 2, and was thus advised what they were about to undertake. We have reached the conclusion, upon all the evidence, that she did not make any substantial change of course to the eastward, although the district judge held that she "ported some." The evidence is overwhelming that the

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collision took place near the middle of the river. That fact, coupled with the unanimous testimony of all on the Viking, who were watching and in an excellent position for observing, is most persuasive. We find, however, in the presence of the Carter and her tow, a sufficient excuse for the Sewell's holding her course. Porting strongly might have brought about another collision. It is contended that the Sewell was in actual violation of a statutory rule (article 25 of the act of June 7, 1897) which provides that "in narrow channels every steam-vessel shall when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel." This is apparently raised here for the first time. It is not charged as a fault in any of the pleadings. But conceding even that, before the collision, the Sewell was a short distance to the westward of where article 25 required her to be, she was on the proper side of mid-channel when collision took place, and the presence and maneuvers of the Carter would have interfered with her being at that time further to the eastward had she been originally where article 25 required. Her fault of prior navigation, therefore, assuming that article 25 applied, was remote, and not contributory to the collision.

The decree of the district court is affirmed, with interest and costs to libelants against Transfer No. 9, and costs to the Sewell against the Viking.

(107 Fed. 540.)

THE ST. LOUIS and THE ROBERT HADDON.

(Circuit Court of Appeals, Second Circuit. February 7, 1901.)

No. 49.

COLLISION—TOW AND STEAMSHIP.

A tug was proceeding up the North river opposite the berth of an ocean steamship, with two vessels in tow at about midchannel. The tow was making against the ebb tide about three knots an hour. It is customary for ocean steamships backing from their berths to proceed out into the middle of the river to give room to straighten on their course. The steamship had signaled her intention to back out, and the men on the tug could have discovered that she was backing out when 1,400 feet below the steamship's berth, but they made no change in the speed or the course of the tug. The steamship did not observe the tug until it had passed about 300 feet beyond the steamship's course, when its engines were put to go ahead and her sternway checked, but the steamship's stern struck the second vessel of the tow. *Held*, as it was seven or eight minutes after the steamship commenced to back out before the collision, the tug had ample time to protect her tows from collision, and was liable for the injury.

Appeal from the District Court of the United States for the Southern District of New York.

Le Roy S. Gane, for appellant.
H. G. Ward, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

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PER CURIAM. The court below adjudged both the steamship and the tug in fault for the collision by which the tow of the latter was injured, and, the owner of the steamship not having appealed, the only question in this court is whether the tug was in fault. As no opinion was delivered in the court below, we do not know what view of the facts was taken by the district judge; but, upon the facts as we deem them established by the record, we agree with his conclusion that both vessels were in fault. The collision occurred in the North river, about midchannel, opposite the steamship's berth at the south side of pier 14. The tug was proceeding up the river, and at about midchannel, with two vessels in tow,—the first attached to the tug by a hawser of about 40 fathoms, and the second attached to the first by a hawser of about the same length. The vessels were making against the ebb tide a speed of about three knots an hour. It is customary for steamships the size of the St. Louis, when backing from their berths preparatory to a voyage at sea, to proceed well out in the middle of the river, in order to give vessels going up and down the river ample room to pass by while they are maneuvering to straighten on their course. The steamship had signaled by a long whistle her intention to back out, and those in charge of the tug discovered or should have discovered that she was backing out when the tug was at a distance of from twelve to fourteen hundred feet below the steamship's berth; but they made no change in the course or the speed of the tug. Those in charge of the steamship did not observe the tug and her tows until the tug had passed about three hundred feet beyond the line of the steamship's course. Thereupon the steamship's engines were put to go ahead, and her sternway checked. At about that time the tug altered her course to port. These maneuvers were too late to prevent a collision, and the steamship's stern struck the second vessel of the tow. Upon these facts the tug was plainly at fault, unless those navigating her were justified in assuming that the path of her tows was so far beyond the area of the steamship's maneuvers as to preclude risk of collision. It was seven or eight minutes after the steamship commenced to back out before the collision. The tug had in the meantime ample room to maneuver as might be necessary to protect her tows from collision. A moderate change of course to port would have obviated all risk of collision, but the tug, though having the steamship on her starboard bow, did not make any change of course until it was too late. The court below evidently did not believe the testimony for the tug that she and her tows were considerably to the west of the midchannel. If that had been the fact, those navigating the tug would have had a right to rely upon the steamship's conforming to the usage until the contrary became apparent. We are satisfied that was not the fact, and, although the steamship was culpable in not observing more carefully the movements of the tug, there would not have been a collision if the tug had properly conformed her movements to the situation.

The judgment is affirmed, with interest and costs.

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(107 Fed. 542.)

THE GEORGE L. GARLICK.

In re MORAN.

(Circuit Court of Appeals. Second Circuit. February 27, 1901.)

Nos. 64, 65.

1. COLLISION—EVIDENCE—REVIEW.
   In an action for damages for a collision between a schooner and a tug and tow, where the testimony of the witnesses from the tug and schooner are most conflicting, and the opinion of the trial judge shows that the credibility of the witnesses was doubtful, his decision, based on the evidence of disinterested witnesses, will not be disturbed.
2. SAME—LIMITING LIABILITY.
   Where there was conflicting evidence before the commissioner in proceedings to limit liability after collision, his decision as to the value of the vessel will not be disturbed.
3. SAME—APPRAISAL.
   The value of the vessel and freight for the purposes of limitation of liability is to be assessed at no later period than the termination of the voyage during which the collision happened.[1]

Appeal from the District Court of the United States for the Eastern District of New York.

The first of the above-entitled causes comes here on appeal from a decree of the district court, Eastern district of New York, holding the George L. Garlick solely responsible for a collision between the ice barge Stuyvesant, in tow of the Garlick, and the schooner Uriah F. Washburn, owned by the libelants. 88 Fed. 553. The second cause is here on appeal by petitioners from a decree limiting liability to the sum of $3,000. The collision occurred about 1 a. m., below Yonkers, on the Hudson river. There was very little wind from the northward, and the schooner, which had double-reefed her mainsail earlier in the night, was coming down the river, meeting the first of the flood tide at Yonkers. The steam towboats Niagara and Baker, with a large tow of about 48 canal boats, arranged in tiers of four boats each, on hawsers about 100 fathoms long, were proceeding up the river. At the tail of this tow was the tug Komuk, acting as a helper. The Garlick, with the Stuyvesant in tow on a hawser about 120 to 150 feet in length, had come up the river behind the Niagara's tow, and was passing the same on the eastward. When near the head of the tow, the schooner and the Stuyvesant came into collision, the latter striking the former on her port bow at a considerable angle. Both boats went over into the large tow, fetching up against the third tier from the forward end, and damaging the canal boat Breed. The owner of this last-named canal boat heretofore libeled the schooner in the Southern district of New York, but the libel was dismissed, and the schooner held free from fault. The evidence, most of which was taken in court, is voluminous, and extremely contradictory. The libelants' story is that the schooner was heading straight down that reach of the river; that the lights of the Niagara and her tow were seen ahead on the starboard hand; that the light on the Garlick, with the Stuyvesant in tow, was seen further off than the Niagara's tow, and on the schooner's port hand; that the schooner kept her course without change; that, as the Garlick approached, she sheered to the westward, across the schooner's bows, barely clearing the schooner herself, and bringing her barge in collision with the schooner, the barge hitting the schooner on the port bow, and carrying the schooner over to the westward against the Niagara's tow. The schooner alleges that she made no change

[1] Limitation of shipowner's liability, see note to The Longfellow, 45 C. C. A. 387.

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of her course until just as the Garlick was passing ahead of her, when her head was starboarded, to go, if possible, to east; but not in time to produce much, if any, effect upon the heading of the schooner. The story of the Garlick is that as she was passing up on the east side of the Niagara's tow the green light of the schooner became visible on her starboard bow, and that the course of the Garlick was not changed, inasmuch as the vessels were going green to green; that, when the schooner had approached within a few hundred feet, she showed both lights, showing that her course had been changed to the westward, whereupon danger signals were blown by the Garlick; but that the schooner kept on heading to the westward, and struck the stern of the barge, whose course, as well as that of the Garlick, had not been changed, but was all the time parallel to the side of the Niagara's tow.

Robert D. Benedict, for appellants.
Peter Alexander, for appellees.
Nelson Zabriskie, for certain claimants.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. All efforts to harmonize the evidence have proved hopeless. The testimony of the witnesses from tug and schooner is most unsatisfactory when consulted in print, and the opinion of the district judge indicates that the appearance of both these groups upon the stand did not add to their persuasiveness. Under these circumstances it seems the wiser course to turn to witnesses not connected with either side, and see whether their story confirms the theory of the Garlick sufficiently to warrant a reversal of the district court. Some propositions are clearly established by the proof. The colliding vessels were not coming together head on. One was to the eastward of the other; and, if both had continued up and down the river respectively, there would have been no collision. Both could not have changed their course to the westward, and produced the results described. It follows that one of them must be in fault; the other not. Moreover, it is manifest that the one whose change of course to the west produced the collision must, before such change, have been the easternmost of the two. Unless, therefore, the evidence of the disinterested witnesses should be found to indicate that the Garlick, while overtaking it, was nearer the Niagara's tow than the schooner was when passing it, the conclusions of the district judge should not be disturbed. One Terry, or Tyrrel, was the owner of the canal boat Bogart,—outside boat in the fourth tier. He says he was on deck, and noticed the Garlick as she lapped the tow, and again when she was about a length ahead of him, and noticed the schooner coming showing both lights. He says the tug passed up parallel with the tow about 150 feet off. The intelligence of the witness, as disclosed in his testimony, compares unfavorably with that of the other two disinterested witnesses. Moriarty, the pilot of the Komuk, testifies that she was tied up to the outside of the third tier from the rear of the tow when the Garlick passed him. The latter blew a whistle, which he took to be a salute to himself, and which he returned. The Garlick was then heading straight up the river, and about 500 to 600 to the eastward of him. After returning the supposed salute, he dropped back to the rear of the tow to take out two boats, and noticed nothing further until he heard the Garlick's alarm whistles, when he looked up, and saw the latter

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heading diagonally across to the westward towards the Niagara's tow, pulling over for the tow, and near the head tier. The Garlick shut off the schooner's lights, but witness, by the lights in Yonkers, could see the schooner herself heading straight down, as near as he could see. Wood, the pilot of the Niagara, went into the pilot house about 12:20 p. m. According to his custom, he looked around, and saw the red light of the Garlick way in to the eastward. Subsequently he saw the schooner while still quite a long way off. He is confused and inexact as to the bearings of both vessels when first seen, but is very positive that the schooner was nearer to the Niagara and her tow than the Garlick was, and that the latter changed her course so as to go across the river in front of the schooner. Upon this state of the proof we do not feel warranted in reversing the decision of the district court.

The appeal in the proceeding to limit liability arises on the following facts: The collision occurred October 4, 1894, and the Garlick was attached November 16th. On November 20th two appraisers, and on November 23d a third one, were appointed by the court to appraise her value. They each made a sworn report November 27th, agreeing on a valuation of $3,000. The claimants prepared bonds for that amount, but subsequently changed their minds, and did not execute them. The vessel was thereupon sold by the marshal December 27, 1894, for $1,790, and the proceeds paid into the registry. On August 26, 1896, petition was filed to limit liability, and on August 1, 1898, an order of reference was made to the United States commissioner to take evidence, and make due appraisement of the value at the end of the voyage, October 4, 1894. He reported $3,000. Exceptions were filed and argued before the district judge, and the commissioner was sustained. From that decree appeal is taken.

There was conflicting evidence before the commissioner. Claimant and his partner, and four of the bidders who attended the sale in December, and made a somewhat cursory examination of the tug, testified to valuations ranging between $1,500 and $2,000. On the other hand, besides the sworn appraisals made, one of the appraisers, who has made a very careful examination, testified to a valuation of $3,000 as of October 4th. The commissioner saw and heard these witnesses, and, in view of this conflict, his conclusion on a question of fact will, ordinarily, not be disturbed; and we do not find in the results of this sale at auction, held three months afterwards, in the depth of winter, and after the Garlick had been in another collision, sufficient to warrant a departure from the usual practice. The last clause of admiralty rule 57, "If the ship have already been libeled and sold, the proceeds shall represent the same for the purpose of these rules," cannot be construed as providing that in the case specified the value of the vessel, freight, etc., for the purposes of limitation of liability, is to be assessed as of any later period than the termination of the voyage during which collision happened. The decrees of the district court are affirmed, with costs.

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(107 Fed. 545.)

STOUT et al. v. RIGNEY.

(Circuit Court of Appeals, Eighth Circuit. February 28, 1901.)

No. 1,443.

1. LIMITATIONS—SUITS TO RECOVER REAL PROPERTY—MISSOURI STATUTE.
Rev. St. Mo. 1899, § 4262, which limits the time within which an action may be brought for the recovery of lands or tenements to 10 years, and which, under the decisions of the state courts, applies to all suits, whether legal or equitable, in their nature, may be invoked by a purchaser in possession under a deed executed upon a foreclosure sale against a suit by the mortgagor to redeem, where the possession of the defendant was adverse to the complainant.

2. ADVERSE POSSESSION—GRANTEE UNDER FORECLOSURE SALE—IRREGULARITY OF PROCEEDINGS.
One who enters upon land under a trustee's deed which purports to convey an absolute title, and which was executed upon a sale by the trustee in a mortgage, the purpose of which was to bar the mortgagor's equity of redemption, must be regarded as holding adversely to the mortgagor from the time his deed is recorded, and possession is taken thereunder, although the sale made by the trustee was irregular or premature; and no actual notice to the mortgagor of the adverse nature of his claim is necessary to invoke the running of the statute of limitations for its protection.

3. DEEDS—PROOF—CERTIFIED COPIES OF RECORD.
Rev. St. Mo. 1899, § 941, as construed by the supreme court of the state, requires proof of the loss or destruction of an original deed conveying military bounty lands, to render a certified copy of the record of such deed admissible in evidence, only where such deed was executed in another state, and not acknowledged in conformity with the laws of Missouri. Where such deed was acknowledged in substantial conformity with the laws of the state, although executed and acknowledged in another state, a copy is admissible upon its being shown to the court that the original "is not within the power of the party wishing to use the same" (Rev. St. Mo. 1899, § 933), and such proof is waived where no specific objection is made on that ground to the introduction of the copy.

4. JURISDICTION OF FEDERAL COURTS—CITIZENSHIP OF PARTIES—ACTION IN NAME OF INSANE PERSON.
Where the curator of an insane person is not, by virtue of his appointment, vested with the title to his ward's realty, but is merely a custodian of the ward's personal property,—as under the statutes of Missouri,—and actions to recover real estate must be brought in the name of the ward, or in his name by his curator, the jurisdiction of a federal court in such an action is to be determined with reference to the citizenship of the insane person, and not that of his curator.[1]

Appeal from the Circuit Court of the United States for the Western District of Missouri.

On January 9, 1896, Alice H. Rigney, the appellee, by her curator, Charles Lyon, exhibited her bill of complaint in the circuit court of the United States for the Western division of the Western district of Missouri against Hamilton De Graw and George Stout, the appellants, which contained the following allegations, in substance: That on October 23, 1872, the said Alice H. Rigney was the owner of a tract of land in Carroll county, Mo., known as the "northeast quarter of section 21, township 54, range 22," and was in the peaceable

[1] Diverse citizenship as ground for federal jurisdiction, see notes to Shipp v. Williams, 10 C. C. A. 249; Mason v. Dullaghain, 27 C. C. A. 298; Emigration Co. v. Gallegos, 32 C. C. A. 479.

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possession thereof; that on said day she executed a deed of trust in the nature of a mortgage, conveying said land to Thomas D. Price, as trustee for Hamilton De Graw, to secure the payment to him of $1,800; that on December 7, 1875, there was a sale of the aforesaid property under the deed of trust, at which sale De Graw became the purchaser; that by sundry mesne conveyances the title to the property subsequently became vested in George Stout, one of the appellants, and that said De Graw, and those claiming under him, including Stout, had held possession of the property continuously from December 7, 1875, to the date of the filing of the bill. As ground for relief, the complainant below averred that she was of unsound mind when the deed of trust aforesaid was executed in favor of De Graw, and that she was finally adjudged insane, and placed under guardianship, by the probate court of Lafayette county, Mo., in the month of February, 1895, and that the consideration by her received from De Graw for the execution of the deed of trust on October 23, 1872, was of little or no value. By an amendment to the bill, that was subsequently filed, the complainant below further averred, in substance, that her husband, James Rigney, acquired the title to the land in controversy at a sale of the same for taxes in the year 1868; that she had acquired her husband's title to the land at an administrator's sale of her deceased husband's effects in the month of August, 1872; that at the time De Graw made a pretended conveyance of the property in question to her, and took the aforesaid deed of trust to secure the purchase money in the sum of $1,800, he had no title to the property, the title at that time being in the complainant; and that the sale made under the aforesaid deed of trust on December 7, 1875, was void, for the reason that the deed of trust did not authorize a sale of the property at the time the sale under the same took place. The relief which the complainant sought as against the defendants was an accounting as respects the rents and profits of the land while they had had possession of the same, and a decree restoring the property to the complainant. The case was referred to a master for trial and report, who heard all the evidence, and reported that the complainant was not entitled to relief. Exceptions to the master's report were duly filed, and upon the hearing of the same the lower court overruled the master's recommendation, and entered a decree in favor of the complainant, adjudging that the mortgage in favor of De Graw had been fully satisfied prior to December 7, 1893, by the rents and profits of the land which the defendants below had received, and that they be required to restore the possession of the property to the complainant. 100 Fed. 213. The case comes to this court on appeal from such decree.

Louis H. Waters and Harry Lander (J. L. Minnis, on the brief), for appellants.

George H. English and George H. English, Jr., for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The charge which is contained in the amended bill of complant, to the effect that the complainant below was the actual owner of the land in controversy at and prior to the conveyance of the same to her by Hamilton De Graw, and that the latter deed conveyed no title, and that the notes and deed of trust which were executed by the complainant on October 23, 1872, were for that reason without consideration, is not supported by the evidence, and such claim on the part of the complainant must be disregarded. Notwithstanding the alleged tax title to the land in controversy, which, as the complainant claims, formed a part of the assets of her deceased husband's estate, and was subsequently acquired by her, it appears that she was dissatisfied therewith, and that before acquiring such tax title she entered

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into a formal written contract with Hamilton De Graw in the month of January, 1872, to purchase the De Graw title to the land for the sum of $2,000. This agreement was carried into effect on October 23, 1872, on which date the De Graw title was conveyed to the complainant, and a deed of trust was executed by her and delivered to De Graw to secure the unpaid portion of the purchase money, which then amounted to $1,800, the residue, as it seems, having been paid in money. This transaction between the complainant and De Graw estops her from asserting that the deed executed by Hamilton De Graw conveyed no title to the lands in controversy, and from asserting that her notes which were given for the purchase money, and were secured by a deed of trust, were without consideration. The trial court, as well as the master, adopted this view of the case, and we are convinced that such ruling was right. The result is that from and after October 23, 1872, when the deed of trust was executed, the complainant sustained towards Hamilton De Graw the relation of a mortgagor in possession, she having voluntarily elected to purchase the De Graw title and execute her notes for the purchase money. Although, in her original bill, the complainant founded her right to relief solely upon the ground that she was insane on October 23, 1872, when the deed of trust in favor of De Graw was executed, and that she remained in that condition until February, 1895, when she was formally adjudged to be incapable of managing her affairs, yet we do not deem it necessary to consider that contention at length. The master, after a painstaking review of the testimony, found against the complainant on this issue, holding that she possessed sufficient mental capacity at that time for the transaction of business, and that she retained such capacity continuously up to the date of the trial. The trial judge concurred in that view to the extent of holding that she was sane on October 23, 1872, and for many years thereafter. He differed with the master only in finding that the complainant had become mentally incapable of managing her affairs several years prior to February, 1895, and to that extent only does there appear to have been any disagreement as respects her mental condition. A cross appeal was not taken in behalf of the appellee for the purpose of obtaining a review of these findings, and such examination as this court has made of the testimony bearing upon that issue convinces us that we would not be warranted in any event in overruling the finding of the master, especially as his finding was approved in substance by the trial court. It must accordingly be assumed that the deed of trust in question was executed when the complainant was in her right mind, and fully capable of attending to her business interests, and that she remained in that condition for at least 20 years thereafter, or until about the year 1893.

In the amended bill a further ground of relief was alleged, such additional allegation being that there was a premature foreclosure of the deed of trust that was held by De Graw, by reason of which fact the complainant's equity of redemption was not barred. The proof to sustain this averment showed that the deed of trust was given to secure five notes for the sum of $360 each, due, respectively, on April 1, 1873, April 1, 1874, April 1, 1875, April 1, 1876, and April 1, 1877.

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The clause in the deed of trust authorizing the trustee to make a sale of the mortgaged property was as follows:

"Now, if the said Alice H. Rigney, her executors or administrators, shall pay the sum of money specified in said note, with all the interest that may be due thereon, when said note shall become due and payable, according to the tenor and effect thereof, then this deed shall be void, and the property hereinbefore conveyed shall be released at the expense of said Alice H. Rigney; otherwise, the same shall remain in full force. And the said T. D. Price * * * may proceed to sell the property hereinbefore described, or so much thereof as may be necessary to pay the amount specified in said notes, with interest, and the costs of this trust, at public vendue, for cash, at Carrollton, in the county of Carroll, first giving thirty days' notice of the time, terms, and place of sale and of the property to be sold, by advertisement," etc.

The sale under the deed of trust took place after proper advertisement on December 7, 1875, when only three of the aforesaid notes were overdue and unpaid; but the deed which was executed by the trustee in pursuance of the power of sale contained a recital that "default was made in the payment of the principal and interest of said notes secured by said deed," by reason whereof the trustee had proceeded to execute the powers to him given by virtue of the deed of trust. In view of these facts the trial court held that such foreclosure sale was premature and void, for the reason that all the notes secured by the trust deed were not due when the sale was made. It further held, in substance, that, as the trustee's sale was void, the purchaser of the property at said sale entered into possession of the property as a mortgagee; that those who subsequently held under him by mesne conveyances, including the defendant Stout, entered upon and held the property in the same capacity; and that such continuous holdings for a period of more than 20 years did not operate as a bar to the complainant's right to redeem, because notice was not brought home to the complainant that they were holding the property adversely, and in denial of her right to redeem.

The principal question presented by the appeal is whether this latter view is tenable. In the state of Missouri, where the land in controversy is situated, it is well settled by repeated decisions that the statute of that state (Rev. St. Mo. 1899, § 4262), which declares, in substance, that no action for the recovery of lands or tenements shall be commenced by any person unless it appears that the plaintiff or other person under whom he claims were seised or possessed of the premises in question within 10 years before the commencement of such action, applies to all civil actions for the recovery of real property, whether they are such as were denominated legal or equitable prior to the Code. According to the decisions in that state, which are binding upon this court in suits affecting the title to land there located, the statute in question is applicable to suits to enforce trusts in real property, and to actions brought to set aside deeds made in fraud of creditors. It may also be invoked by a mortgagor to bar the foreclosure of a mortgage when the mortgagor asserts that he has held possession for more than 10 years without recognizing the mortgage, and in open denial of the same and the mortgagee's alleged right to foreclose. Rogers v. Brown, 61 Mo. 187, 195; Kelly v. Hurt, 61 Mo. 463, 466; Lewis v. Schwenn, 93 Mo. 26, 31; Bush v. White, 85

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Mo. 339, 359, 360; Reed v. Painter, 145 Mo. 341, 356, 46 S. W. 1089. It is clear, therefore, that the defendants in the case in hand may invoke the protection of the statute in question if their possession subsequent to the sale under the deed of trust on December 7, 1875, was adverse to the complainant. The decree in the lower court appears to have been rested solely on the ground that, because the sale under the deed of trust was premature, the entry which was made by the purchaser at that sale was in subordination to the rights of the mortgagor, and that the possession so taken was not an adverse possession, and could not become such without actual notice to the mortgagor that he denied her right to redeem. We do not deem it necessary on the present occasion to determine whether the sale under the deed of trust was in fact premature, or whether the default which was made by the complainant in the payment of three of the notes secured by the deed of trust warranted the trustee in exercising the power of sale thereby conferred. For present purposes we shall assume, without deciding, that the view of the learned trial judge on this point was correct. But does it follow from this concession that the purchaser at the trustee's sale must, for that reason, be regarded as having entered into possession of the property in the capacity of a mortgagee, irrespective of his actual intention, and that his seisin and possession was thereafter the seisin and possession of the complainant until he had notified her to the contrary, so that the statute of limitations could not in the meantime be invoked against her? We are of opinion that this question should be answered in the negative. The character of the possession in question, whether adverse or otherwise, must be determined from all the facts and circumstances of the case, and particularly with reference to the dominion exercised over the property by the purchaser and by his grantees subsequent to the sale. If the acts done and performed by those in possession were of such a nature as would naturally advise the world that the occupants claimed to be the owners of the fee, and such was their claim in fact, then their possession was adverse, and of such a nature as operated after the lapse of 10 years to bar the complainant's right of redemption. The testimony in the case shows that the trustee's deed which purported to convey the title in fee to Hamilton De Graw was duly recorded in Carroll county, Mo., on the day it was executed, to wit, on December 7, 1875, when it became constructive notice to all the world of its contents; that De Graw took possession of the property under said deed on January 1, 1876; that he subsequently conveyed the land as his own to other parties; and that the title, after various transfers, became vested eventually in the defendant Stout. The proof also shows open and notorious possession of the property by De Graw and those claiming under him from January 1, 1876, until the present action was instituted, and that in the meantime there had been no assertion by the complainant of her right to redeem, or any recognition of that right by any of the successive occupants of the land. In view of these facts we entertain no doubt that De Graw and each of his successors in interest entered into possession of the land claiming to be the absolute owners thereof. The dominion which they respectively exercised over the property is consistent with that view, and

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wholly inconsistent with the theory that they assumed possession of the property merely as mortgagees to protect a lien which they had acquired. Nor do we believe it to have been essential to render their possession adverse that they should have notified the complainant that they were holding the land adversely, and would dispute her right to redeem, inasmuch as the entry was made under a deed which purported to convey an absolute title, and which also professed to foreclose her right to redeem. In the case of Rogers v. Brown, 61 Mo. 187, 195, it was ruled, among other things, that the grantee under a fraudulent conveyance would be regarded as holding adversely to creditors who had challenged the validity of the conveyance from the time his deed was recorded, and we perceive no sufficient reason why one who enters upon land under a trustee's deed which purports to convey an absolute title, and to have been made with a view of barring the mortgagor's equity of redemption, should not be regarded as holding adversely to the mortgagor from the time that his deed is recorded and possession is taken, although the sale made by the trustee was irregular or premature. The precise question last suggested arose in the case of Miner v. Beekman, 50 N. Y. 337, 344, in which case it was decided that the statute of limitations began to run against the purchaser of the equity of redemption, who had not been made a party to an action of foreclosure which was brought against the mortgagor, from the time the mortgagee entered into possession as a purchaser under the defective decree of foreclosure. Our conclusion is, therefore, that the complainant's right to redeem was effectually barred by the statute of limitations long before the present bill was filed, she having been of sound mind at the time of the adverse entry on January 1, 1876, and for many years thereafter.

The conclusion last announced will necessitate a dismissal of the bill of complaint; and such action is also rendered necessary by the fact that the complainant appears to have conveyed away all of her interest in the property in controversy by a deed made to William H. Stevenson on August 26, 1875, which deed was acknowledged in accordance with the laws of the state, and duly recorded in Carroll county, Mo., on November 26, 1875. A certified copy of the record of that conveyance was admitted in evidence by the master to show that the complainant had parted with her interest in the property, but the trial court held, on exceptions to the master's report, that it was erroneously admitted, and refused to recognize it. The reason assigned by the trial court for the rejection of this conveyance was, in substance, that the statute of the state (Rev. St. Mo. 1899, § 941) only allows copies of deeds affecting military bounty lands to be read in evidence "upon proof of the loss or destruction of the original instrument." The lands in question in this case are what are known as "military bounty lands," and no proof was adduced at the trial to establish the loss or destruction of the original deed. It should be observed, however, that no such objection to the deed was made before the master when the same was offered and received in evidence, the objection at that time being, in substance, that it was incompetent, irrelevant, and immaterial. In the case of Tully v. Canfield, 60 Mo. 99, it was expressly decided that, when a deed conveying military bounty lands is acknowl-

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edged according to the statutes of Missouri, a certified copy thereof may be read in evidence without previous proof of the loss or destruction of the original, although it was acknowledged outside of the state; and that the section of the statute above referred to, requiring proof of the loss or destruction of the original instrument before a copy thereof shall be admitted in evidence, only applies to those conveyances affecting military bounty land which are executed in a foreign state, and acknowledged in conformity with the laws of that state, and not in conformity with the laws of Missouri. We are unable to discover that the doctrine enunciated in this case has ever been overruled since the case of Crispen v. Hannavan, 50 Mo. 416 (and the same case as reported in 72 Mo. 552), wherein it was held that the provisions of section 941 were applicable, and required proof of the loss or destruction of the original deed, was a case in which the acknowledgment had been taken outside of the state of Missouri, and not in conformity with its laws. The deed executed by the complainant in favor of Stevenson, although executed and acknowledged in the state of Illinois, was executed and acknowledged in substantial conformity with the laws of the state of Missouri; and within the rule announced in Tully v. Canfield, a certified copy thereof was admissible in evidence upon its being shown to the court that the original was "not within the power of the party wishing to use the same." Rev. St. Mo. 1899, § 933. As the deed in question was not objected to when it was offered upon the ground that the latter species of proof was not made, we are of opinion that the objection to the deed on that ground was waived, as was held by the supreme court of the state, under similar circumstances, in the case of Boogher v. Neece, 75 Mo. 385. The trial court seems to have erred, therefore, in rejecting the conveyance to Stevenson, which showed prima facie that the complainant below had parted with all of her interest in the property, and had no right to maintain the action.

In conclusion it should be observed that the defendants below, who are the appellants here, insisted in the lower court that it had no jurisdiction, and the same contention is renewed here. This contention is founded upon the fact that Charles Lyon, the curator, is a citizen of the state of Missouri, of which state the defendants below are also citizens, and that the requisite diversity of citizenship, for that reason, is not shown. This contention was overruled by the trial court, and its action in that regard meets with our approval. In the state of Missouri, from which Lyon derived his appointment as curator, the curator of an insane person is not vested with the title to his ward's real property, and actions of ejectment in that state and other actions of a like nature to recover the possession of real property must be brought in the name of the insane person, or in the name of the insane person acting by and through his curator. Reed v. Wilson, 13 Mo. 29; Allen v. Ranson, 44 Mo. 263. As the curator of an insane person is not, by virtue of his appointment, vested with the title to his ward's realty, but is merely a custodian or bailiff of the ward's personal property, an action like the one at bar must, of necessity, be brought in the name of the insane person, or in the name of the insane person by his curator, and the jurisdiction of the federal courts

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in such cases should be determined with reference to the citizenship of the insane person, rather than by the citizenship of the curator.

It results from the foregoing that the decree of the lower court must be reversed. It is so ordered, and that the case be remanded to the circuit court, with directions to dismiss the bill of complaint.

(107 Fed. 552.)

CITY OF EAU CLAIRE v. PAYSON et al.

(Circuit Court of Appeals, Seventh Circuit. April 9, 1901.)

No. 728.

1. JURISDICTION OF FEDERAL COURTS—CITIZENSHIP OF PARTIES—SUIT BY ASSIGNEE.

   A trustee in a mortgage executed by a water company, claiming the right by virtue of the provisions of such mortgage to collect rentals due the company, cannot maintain an action against a city to recover an amount alleged to be due the company as rentals in a federal court, where the company and city are corporations of the same state; his sole right to maintain such an action being as assignee of the contract between the city and company.[1]

2. EQUITY JURISDICTION—ACTION ON CONTRACT—ENFORCEMENT OF LEGAL LIABILITY.

   A right of action against a city to recover rentals alleged to be due it under a contract with a water company is at law, and the fact that the company has made an equitable assignment of the contract by way of mortgage does not give the assignee the right to sue thereon in equity, merely because his own interest is equitable, and he cannot, by joining the city as defendant, have its rights determined in a suit to foreclose the mortgage. The city is entitled to have its rights and obligations under such contract determined by a trial in a court of law.

3. SAME—REQUIRING PARTIAL PAYMENT ON UNADJUDICATED CLAIM.

   A court of equity, in a suit to foreclose a mortgage on the property of a water company, in which it has appointed a receiver, has no power to require a city to pay to such receiver a sum on account of alleged indebtedness to the mortgagor for water rentals, which is denied by the city and has not been adjudicated.

4. APPEAL—APPEALABLE ORDER.

   An order made by a court requiring a city to pay a sum to a receiver on account of a disputed claim against the city, which makes no provision for the return of the money in any case, is appealable as a final decree, although it leaves the question of the city's ultimate liability for future determination.

Appeal from the Circuit Court of the United States for the Western District of Wisconsin.

This suit was brought by the trustee in a deed of trust executed by the Eau Claire Waterworks Company to secure a series of bonds, and by holders of the bonds, for the purpose of obtaining a decree of foreclosure. Besides the water company, the city of Eau Claire was made a defendant, and relief asked against it on the ground that by the ordinance under which the waterworks were constructed the city became bound to levy a special annual tax for the payment of hydrant rentals, the proceeds of the tax to be set apart as a "fire hydrant fund," applicable exclusively, as provided in the ordinance

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[1] Diverse citizenship as ground for federal jurisdiction, see notes to Shipp v. Williams, 10 C. C. A. 249; Mason v. Dullagham, 27 C. C. A. 298.

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and in the trust deed, to the payment of interest upon the bonds. The bill alleges that "hydrant rentals, amounting to twenty-four thousand and fifty-four dollars" (three semiannual installments), "have heretofore been collected by the defendant city, by special tax therefor, and are now on hand in the treasury of the defendant city as a special fund for the payment of said interest," and prays that the trust deed may be declared a lien thereon, that the city be decreed to pay the same to the trustee, and further asks the appointment of a receiver, with the usual power over all the property, rights, and franchises of the water company, and of the moneys which are or shall become owing by the city for hydrant rentals or otherwise. A copy of the ordinance referred to is set out, and the following provisions thereof have been emphasized in the briefs and oral argument:

"Sec. 6. * * * And a sufficient tax shall be levied and collected annually upon all the taxable property on the assessment roll of the city of Eau Claire, to meet the payments under this ordinance when and as they will respectively mature during the existence of any contract for hydrant rentals, which tax shall be irrepealable; and in case the city of Eau Claire shall be authorized [and such authority was given by the act of February 18, 1885] to levy a special tax for such purchase [purpose], such tax shall be annually levied and the proceeds thereof shall be kept as a separate fund, known as 'Fire Hydrant Fund,' and shall be irrevocably and exclusively devoted to the payment of hydrant rentals under this ordinance, and shall not be otherwise employed. * * *"

The ordinance also contained provisions imposing obligations upon the water company in respect to the character, construction, capacity, maintenance, and extension of its plant, requiring it, among other things, to supply the city and its inhabitants with "good and wholesome water, suitable for domestic, manufacture and fire purposes," and to have a filtering apparatus "so constructed, operated and maintained as to furnish at all times suitable water for domestic use." Upon the filing of the bill and service of process, the waterworks company at once appeared and answered, and thereupon the court appointed the appellee W. H. Willard receiver, and directed him to take immediate possession of all the property of the company, to conduct the company's business, to continue the operations of the plant, to institute and prosecute all suits, actions, and proceedings necessary in his judgment for the protection of the property and the trust vested in him, to defend suits and actions, and out of the money coming into his hands "in the operation of said properties" to pay, in their order, current expenses, taxes, and assessments, sums due employés, officers, or attorneys for services rendered during the past six months, and for supplies furnished during that period, and, with the sanction of the court, amounts necessary to protect the property from sale under leases, pledges, mortgages, or contracts; "and the money belonging to said company, not used as hereinbefore provided, shall be held by said receiver until he is authorized to dispose of the same under the order or decree of this court."

This appointment was made on July 2, 1900. On the ensuing 23d, upon the verified petition of the receiver,—not filed, apparently, until two days later,—the court ordered the city of Eau Claire to show cause, if any it had, on or before August 3, 1900, why an order should not be made in accordance with the prayer of the petition, and that the city serve upon the solicitor of the petitioner, five days before the day of the hearing, "any and all papers or documents of every kind and description" which the city desired to use at the hearing. The petition of the receiver, in substance, reiterated the averments of the bill, and prayed an order requiring the city and its treasurer to attorn to the petitioner, and forthwith pay to him the rentals due to the amount of $24,054, and a further sum of $400 alleged to be due. On the day appointed for the hearing the city entered a written appearance by its solicitor "for the purpose of objecting to the relief prayed for in the order to show cause," and submitted "affidavits for such purpose only, and to show that the relief prayed for should not be granted, and not for the purpose of submitting on this motion, or in this action, for determination, the question of what amount, if any, is due from the city of Eau Claire to the Eau Claire Water-

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works Company, the trustee or receiver, the said city objecting that said question cannot be determined on this motion or in this action, and it does not desire in any manner to waive its said objection."

The affidavits of the city clerk and other officers, read at the hearing on behalf of the city, besides denying performance of the contract by the waterworks company, show that whatever taxes had been levied and collected for the payment of water rental had been included in a general levy for city purposes, and "that no special tax was levied or assessed by said city of Eau Claire for the year 1898, the year 1899, or the year 1900, or at any other time, to deponent's knowledge, as a special or separate tax for the payment of hydrant rentals, either under the name of the 'Fire Hydrant Fund,' or under any other name whatever; that there is no fund in the hands of the city treasurer of said city known as the 'Fire Hydrant Fund'; there is no separate fund in his hands collected or kept for the purpose of paying hydrant rentals; that all moneys heretofore paid to the Eau Claire Waterworks Company, for hydrant rentals, while deponent has been city clerk of said city, and prior to that time, as far as deponent knows or can ascertain, have been paid out of the general fund of said city on verified claims of said Eau Claire Waterworks Company, presented to the common council of said city from time to time, and allowed by the council in the manner that other claims are presented against, and allowed by, said city."

The court having heard the affidavits and the arguments of counsel, and, as the entry reads, "it satisfactorily appearing to the court that there is now in the treasury of the defendant city of Eau Claire funds collected by said defendant city, by taxation, for the purpose of paying hydrant rentals contracted to be paid for by said defendant city of Eau Claire to the defendant Eau Claire Waterworks Company, in and by the ordinance contract under which said waterworks company constructed said waterworks plant at Eau Claire, and it appearing to the satisfaction of the court that said complainants have a lien in equity upon said funds so collected by the said city of Eau Claire, now in the treasury thereof, for the payment of hydrant rentals, and the court being sufficiently advised," on motion of the solicitor for the receiver, "ordered that said defendant city of Eau Claire do, within ten days after the service of a copy of this order upon the mayor, city clerk, and city treasurer of the defendant city of Eau Claire, pay over to said W. H. Willard, receiver herein, a portion of said funds so collected by said city of Eau Claire, for the payment of hydrant rentals, to wit, the sum of sixteen thousand and thirty-six dollars, and that said city may retain the residue of said funds so collected for the payment of hydrant rentals claimed by the complainants to be due, until the further order of the court, it not being intended by this order to determine what amount, if any, is due from the defendant city for hydrant rentals, but said question will be determined by the decision of the issue hereinafter directed to be made up and referred to H. M. Lewis, special master. On like motion, it is ordered that the petition herein of the said receiver filed with the clerk of this court on July 25, 1900, stand as a bill of complaint, and that the city of Eau Claire have leave to file its answer thereto on or before the first Monday in September, 1900, and that said receiver have leave to reply to said answer within twenty days thereafter. On like motion, it is ordered that the issues of fact and law raised by said pleadings be, and the same are, referred to H. M. Lewis, of the city of Madison, Dane county, Wisconsin, as special master in chancery, to take proofs, and report his findings of fact and conclusions of law thereon to the court, with all convenient speed."

The appeal is from that order, and it is alleged to be erroneous (1) because the court never had jurisdiction of the suit or parties; (2) because the court had no jurisdiction to order the city to pay the sum mentioned without a trial to determine the amount due; (3) because neither the waterworks company nor the receiver ever had any interest in, or lien upon, the money ordered to be paid; (4) because the order was made summarily, without trial, and without opportunity to the city to defend, and before the time when the city was required or permitted to appear, demur, plead, or answer; (5) because the money was ordered to be paid to the receiver absolutely, without provision or security for its return, and without limitation upon the right of the receiver to use or spend it. The appellees have moved to

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dismiss the appeal on the ground that the order was not final, and therefore not appealable.

James Wickham and B. W. Jones, for appellant.

John M. Olin and Harry L. Butler, for appellees trustee and bondholders.

Wm. Ruger, for appellee receiver.

F. M. Miner, for appellee Eau Claire Waterworks Co.

Before WOODS, JENKINS, and GROSSCUP, Circuit Judges.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

The objections to the jurisdiction of the court below over the city of Eau Claire as a defendant seem to be insuperable. The demand against the city is a purely legal one, upon the contract made with the water company. The trustee in the deed of trust has no title to that contract, or right to sue for money due upon it, except as assignee of the waterworks company; the assignment being by force of the trust deed, which in terms conveyed and assigned to the trustee "rents, revenues, income" then owing, or thereafter to be acquired, "and all rights" of the water company "to collect all tolls, rent, and water rates." The water company, being a corporation of Wisconsin, could not have sued the city upon the contract in a federal court, and the assignee can therefore have no better right to sue in that court. Besides, if the jurisdiction were otherwise unquestioned, there was no necessity for a resort to equity. The assignee of a chose in action, or any cestui que trust, cannot sue in equity merely because his interest is equitable. If it be conceded that the trustee in this case acquired the legal title, and had a right in his own name to sue the city upon the contract, it was a right to sue at law, and not in equity. It is true that the bill asks to have declared a lien upon the fund, but, under the circumstances, that is not a matter of substance. It is not alleged that the right of the trustee to whatever should be found due from the city for water rentals had been or was disputed. The contrary is apparent. There was in fact no fund subject to the alleged lien, and it is not to be permitted that a right of action at law can be made cognizable in equity by praying equitable relief, which is not essential to the ultimate remedy sought. The opinion in New York Guaranty Co. v. Memphis Water Co., 107 U. S. 205, 2 Sup. Ct. 279, 27 L. Ed. 484, is in point upon both phases of the question. The objection there made that the assignee of the water company could not sue in the circuit court, that company being a citizen of Tennessee, was declared conclusive if the jurisdiction depended on citizenship alone; and in respect to the jurisdiction in equity, which was recognized as maintainable against "the waterworks themselves, and all the property comprised in the mortgage which is susceptible of actual possession," the court said:

"But the claim against the city does not lie in possession, but in contract alone. The contract itself may be subject to sale as part of the mortgage assets; but the proceeds of the contract, the money alleged to be due from the city to the water company under it, has never been reduced to posses-

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sion, and the city of Memphis denies its liability to pay it. In order to reduce to possession the money claimed to be due, and subject it to the control of the court, the ordinary mode of enforcing the contract must be resorted to. It may be that the circuit court had the power to direct such a proceeding to be had as ancillary to its administration of the mortgage fund; but it must be a proper proceeding, adapted to the nature of the demand. If a promissory note were included in the mortgage fund, and the parties liable upon it should refuse to pay it, the circuit court might probably order the trustees of the mortgage to bring an action on the note; but a bill in equity would hardly be considered a proper proceeding for enforcing its collection. * * * Whether the contract is or is not a valid one, and, if valid, what are the obligations of the city under it, and the damages for the breach thereof, are pure questions of law, which the city cannot, under ordinary circumstances, be compelled to litigate with any other party than the water company or its legal assigns. If the parties having the legal interest refuse to sue, those having the beneficial interest will be authorized to use their names on giving them proper indemnity against costs. The city has a right to be confronted with those who have the legal interest in the contract, unless they absolutely refuse the use of their names, or special circumstances exist which would prevent or greatly embarrass the prosecution of the suit. It does not lose its right to a trial at law by any pledges or assignments which the water company may make of its interest in the contract. Such pledges or assignments may create equitable rights in regard to that interest, as between the water company and the assignees; but the contract, so far as the city is concerned, remains a matter of legal cognizance. If a merchant should pledge his bills receivable as security for a loan, any equitable rights which arise between him and his pledgee may be adjudged in equity, but the makers and acceptors must be sued thereon at law. And so here, while the equities between the water company as mortgagor and the mortgagees, or those claiming under them (such as the right of redemption, etc.), may be determined by a court of equity, the legal demand against the city on the contract is cognizable at law, and should be prosecuted in the ordinary courts of law, as was done in the action brought in the name of the water company against the city. * * * We have lately decided, after a full consideration of the authorities, that an assignee of a chose in action, on which a complete and adequate remedy exists at law, cannot, merely because his interest is an equitable one, bring a suit in equity for the recovery of his demand. Hayward v. Andrews, 106 U. S. 672, 1 Sup. Ct. 544, 27 L. Ed. 271. He must bring an action at law, in the name of the assignor, to his own use. This is true of all legal demands standing in the name of a trustee, and held for the benefit of cestuis que trustent."

It follows from all this that the court ought not to have undertaken to determine, before a proper action had been brought, whether there was due from the city any sum which ought to be paid over upon the contract. The necessary meaning of the order is that in the opinion of the court it was safe, without determining definitely what was due, to require that two-thirds of the sum demanded be paid at once to the receiver, who by virtue of his appointment represented the trustee and the bondholders. Even in a proper case, without question of the jurisdiction of the court over the party, there could be no warrant for such a proceeding before issue joined and a trial of the rights involved. No fund had been set apart as a trust fund, and, even if there had been, the receiver could claim of it only so much as should be found due upon the contract, and, in the absence of averment of danger to the fund by reason of the insolvency of the city or for other cause, there could be no justification for an order requiring partial payment before it had been regularly determined whether anything was due.

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That the order was appealable there should be no serious doubt. To the extent of the payment required, it was essentially a final decree. It was made without jurisdiction over the party affected, compelled the immediate surrender of a large sum of money, and made no provision for its safe-keeping or return in case a return should be found necessary. It was not ordered into the hands of the receiver to be held for future disposition. If that had been intended, the registry of the court would have been the appropriate depositary. There was no necessity for the order except to supply the receiver with money to be used in the performance of his trust, and that he might so use it seems to have been the purpose of the petition in seeking, and of the court in entering, the order. If mere custody of the money was intended, it should have been explicitly so stated. The supreme court has not placed upon the words "final decree," respecting the right of appeal, a strict and technical sense, but has given them a liberal and reasonable construction. Forgay v. Conrad, 6 How. 201, 12 L. Ed. 404; 4 Notes U. S. Rep. 628. See, also, Potter v. Beal, 2 C. C. A. 60, 5 U. S. App. 49, 50 Fed. 860; Trustees v. Greenough, 105 U. S. 527, 531, 26 L. Ed. 1157; Williams v. Morgan, 111 U. S. 684, 699, 4 Sup. Ct. 638, 28 L. Ed. 559; In re Farmers' Loan & Trust Co., 129 U. S. 206, 9 Sup. Ct. 265, 32 L. Ed. 656; Stovall v. Banks, 10 Wall. 583, 19 L. Ed. 1036.

The order is reversed, and the cause remanded for proceedings not inconsistent with this opinion.

(107 Fed. 561.)

JONES v. MOSHER et al.

(Circuit Court of Appeals, Eighth Circuit. March 1, 1901.)

No. 1,375.

1. REMOVAL OF CAUSES—TIME OF APPLICATION—AMENDED COMPLAINT.
   When a cause of action which is removable is first disclosed by an amended complaint filed after the time has expired for pleading to the original complaint, an application for removal should be filed at once, or within the time allowed by statute or rule of court to answer the amended complaint, when such time is prescribed by the local law; otherwise, the right of removal is waived.
2. SAME—PETITION—EFFECT OF REMAND.
   A petition for removal, upon which a cause was removed, but was subsequently remanded, is functus officio, and has no effect upon an amended complaint subsequently filed, even if such complaint renders the cause removable.

In Error to the Circuit Court of the United States for the District of Nebraska.

Richard S. Norval (L. C. Burr, George W. Lowley, J. J. Thomas, and Charles S. Lobinger, on the brief), for plaintiff in error.

J. W. Deweese (Frank E. Bishop and Frank M. Hall, on the brief), for defendants in error.

Before CALDWELL and THAYER, Circuit Judges.

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THAYER, Circuit Judge. The sole question which this record presents is whether the circuit court of the United States for the district of Nebraska, from whence the case comes, lawfully acquired such jurisdiction thereof as enabled it to render a valid judgment dismissing the plaintiff's cause of action. The facts are these: Isaac Holt brought the action originally on February 25, 1895, against Charles W. Mosher et al., the defendants in error, in the district court of Seward county, state of Nebraska. The defendants on March 29, 1895, filed a petition and bond for the removal of the cause to the circuit court of the United States for the district of Nebraska, and the cause was removed; but on the hearing of a motion to remand it the motion was sustained, and the cause was remanded to the state court on May 7, 1895. 74 Fed. 15. Sundry proceedings appear to have been taken in the state court after the cause was remanded, and on May 3, 1897, an amended complaint was filed by leave of court. This amended complaint charged, as the original complaint had charged in substance, that the defendants on and prior to December 7, 1892, were directors of the Capital National Bank of Lincoln, Neb.; that they had failed to faithfully discharge the duties imposed upon them by law; that the deposit account of the bank was falsified, the amount thereof being greatly understated; that the defendants had permitted to be carried upon the books of the bank as valuable assets, and had permitted statements of the condition of the bank to be published wherein were included as valuable assets, numerous notes and bills receivable which were known to them, or ought to have been known to them, to be worthless or of little value; that they had represented to the public and to the plaintiff, by numerous statements, that such worthless assets were good and collectible, knowing that such statements were untrue; that they had represented that the bank was in a sound financial condition, when they were well aware that it was insolvent; that they had made statements showing that the capital of the bank was unimpaired and that it had a surplus, and had also paid dividends on its stock, for some time after the bank was known to them to be insolvent; that the statements and representations aforesaid were made and published with the fraudulent intent of inducing the plaintiff and the public generally to deposit money in the bank; and that by reason of such false statements the plaintiff was induced to so deposit money which he would not have deposited but for such false representations. There were many other allegations contained in said amended complaint, of the general tenor and effect last stated, showing that the plaintiff had sustained loss by the fraudulent acts of the defendants; and attached to said complaint as exhibits were copies of two bank statements made by its cashier, and attested by certain of the defendants as directors, which were said to have been published, and which disclosed on their face that they were statements that had been made in pursuance of the national banking act to the comptroller of the currency. After the aforesaid amended complaint was filed no action was taken in the case, so far as the record discloses, for nearly two years, or until March 6, 1899. At the latter date the plaintiff asked and obtained

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leave to make certain changes in the amended complaint by interlineation, which interlineations were made on March 16, 1899. On April 15, 1899, the defendants demurred to the amended complaint as altered by the interlineations, the reasons assigned for the demurrer being: First, that the complaint disclosed that the court had no jurisdiction of the cause, inasmuch as it was founded upon acts of negligence committed by the defendants as directors of a national bank in violation of the national banking act; and, second, that the complaint did not state facts sufficient to constitute a cause of action. On the same day, to wit, April 15, 1899, the defendants also filed a second petition and bond for the removal of the cause to the circuit court of the United States for the district of Nebraska, on the ground that the amended complaint showed that the decision of the case depended upon the construction and application of federal laws. After a copy of the record had been lodged in the federal court the plaintiff below filed a motion to remand the case to the state court, but this motion was denied, and a judgment was eventually rendered on the demurrer, dismissing the plaintiff's cause of action. We are called upon to determine whether, upon this state of facts, the latter motion to remand was properly overruled, and whether by the second petition for removal the federal court acquired jurisdiction of the case.

In the case of Powers v. Railroad Co., 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673, upon which the action of the trial court in denying the second motion to remand seems to have been predicated, it was held, in substance, that under certain circumstances a case may be lawfully removed to the federal court although the time prescribed by the statute for taking such action has elapsed, and the reason assigned for such ruling was that jurisdiction to hear and determine a case is not dependent in every instance upon the application for a removal being made as required by the statute (25 Stat. 433, § 3) "at the time, or any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff"; such provision as to the time of removal being directory, rather than mandatory. It was said, in substance, that under certain circumstances this provision of the statute will be regarded as waived, or the parties will be held to be estopped by their conduct from asserting it. In that case it appeared that the plaintiff in his original complaint had joined certain persons as parties defendant for the express purpose of preventing the real defendant from exercising his right of removal, and that he had subsequently dismissed the action as to such persons after the period allowed by the statute for the removal of the cause to the federal court had expired. On that state of facts it was decided that a petition to remove the cause from the state to the federal court, which was filed as soon as the aforesaid dismissal took place, was filed in due season. In the case of Railroad Co. v. Austin, 135 U. S. 315, 10 Sup. Ct. 758, 34 L. Ed. 218, it was strongly intimated, if not in fact decided, that a petition for the removal of a cause from a state to the federal court may be filed after the lapse of the statutory period mentioned above, if

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the damages originally demanded were less than $2,000, but greater damages than that amount are subsequently claimed by amending the declaration. The rule which is fairly deducible from these decisions is that when a case as originally brought is not removable, but it becomes so afterwards by a dismissal as to certain parties or by an amendment of the declaration, the right to remove can then be exercised, although the statutory period has expired. It will not do, however, to infer from what is said in the above cases that it is entirely immaterial when a petition for the removal of a cause is filed, provided it be one which in other respects falls within the jurisdiction of the federal courts. Such is not the law, nor the fair construction of the decisions in question. It was said in Powers v. Railroad Co., supra: "Undoubtedly, when the case, as stated in the plaintiff's declaration, is a removable one, the defendant should file his petition for removal at or before the time when he is required by the law or practice of the state to make any defense whatever in its courts;" and, furthermore, that the reasonable view of the statute is to consider it "as, in intention and effect, permitting and requiring the defendant to file a petition for removal as soon as the action assumes the shape of a removable case in the court in which it was brought." As the right to remove an action which falls within the jurisdiction of the federal courts is a substantial right, the federal courts, as Mr. Justice Miller once remarked (Arapahoe Co. v. Kansas Pac. Ry. Co., 4 Dill. 277, 283, Fed. Cas. No. 502), should "be astute not to permit devices to become successful which are used for the very purpose of destroying that right." But the period limited by the statute for removing a cause to the federal court cannot be disregarded, even if it be true that the provision is directory and not jurisdictional. If a declaration or a complaint as originally filed in the state court does not disclose a cause of action which is removable, but such a cause of action is subsequently disclosed by an amendment of the complaint, or by discontinuing the action as against parties who were originally joined as defendants, an application for removal should be made at once, if the statutory period has expired, or it should be made within the time allowed by statute or by rule of court to answer the amended complaint, when such a period is prescribed by the local law.

Applying this rule to the case in hand, the result is that if the amended complaint which was filed on May 3, 1897, stated substantially the same cause of action which was stated after it was amended by interlineation on March 16, 1899, then the second petition for removal was filed too late to oust the jurisdiction of the state court, and we need not concern ourselves with the question whether either one of the complaints, original or amended, stated a cause of action arising under federal laws. If the interlineations made on March 16, 1899, did not change the nature of the cause of action which was counted upon by the amended complaint, then it is manifest, we think, that the defendants waived their right to remove the cause by failing to take any action looking to its removal for nearly two years thereafter. And this is so even if it should be conceded that the amended complaint differed from the original complaint in disclos-

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ing a federal question. We have made a careful examination of the complaint as it stood both before and after it had been changed by interlineation, and such comparison has satisfied us beyond a reasonable doubt that such interlineations as were made by leave of court on March 16, 1899, were unimportant and effected no change whatever in the cause of action. If the interlined complaint shows a right of action arising under federal laws, then, beyond all controversy, the amended complaint before it was interlined showed a right of action of the same character; and the same statement may be made with reference to the original complaint of February 25, 1895, which, as the lower court held, did not disclose a federal question, but stated a cause of action at common law for deceit. Bailey v. Mosher (C. C.) 74 Fed. 15. Realizing, apparently, that the second application for a removal of the cause was made too late, for the reasons already stated, counsel for the defendants have suggested that inasmuch as the original petition for removal, which was filed on March 29, 1895, remained on file, it operated proprio vigore to oust the jurisdiction of the state court as soon as the amended declaration was filed. This suggestion assumes, of course, that the second complaint differed from the first or original complaint as respects the cause of action stated therein, which assumption, in our judgment, is erroneous. We are unable to discover any difference in the cause of action stated in the two complaints. But, aside from this view of the case, we are of opinion that the original petition for removal was functus officio when the case was originally removed and remanded, and that it could not have any effect upon a subsequent amended complaint filed in the case, even if the latter did state a different cause of action arising under federal laws. If such a complaint was filed after the cause was remanded to the state court, it was the duty of the defendants to have prepared and filed a second petition and bond for removal, addressed to the new or amended complaint, and to have prepared and filed such petition and bond within the period heretofore indicated.

The result is that the judgment of the lower court dismissing the plaintiff's cause of action was rendered without lawful jurisdiction of the cause. It is accordingly ordered that such judgment be reversed and annulled, and that the case be remanded to the lower court with directions to vacate such judgment, and to enter an order remanding the case to the state court from whence it was removed.

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(107 Fed. 597.)

JAMES et al. v. GERMANIA IRON CO.,

BELDEN v. MIDWAY CO.

(Circuit Court of Appeals, Eighth Circuit. March 28, 1901.)

Nos. 1,434, 1,433.

1. LAND DEPARTMENT OF THE UNITED STATES—JUDICIAL POWER AND ITS EFFECT.

The land department of the United States is a quasi judicial tribunal, invested with authority to hear and determine claims to the public lands subject to its disposition, and its decisions of the issues presented at such hearings, and its patents issued thereon, are impervious to collateral attack.[1]

2. PATENTS AND DECISIONS OF LAND DEPARTMENT—HOW DIRECTLY ASSAILED.

But a patent or decision of the land department is not impregnable to direct attack. The legal title derived from it may be charged with a trust for the benefit of the party lawfully entitled to it either on the ground (1) that, upon the facts found, conceded, or established without dispute at the final hearing before the department, its officers fell into a clear error in the construction of the law applicable to the case which caused them to issue the patent to the wrong party, or for the reason (2) that through fraud or gross mistake they fell into a misapprehension of the facts proved before them which had the like effect.

3. LAND DEPARTMENT'S FINDING OF FACT—HOW ASSAILED.

One who would attack a patent or decision of the department for a mistake of fact, however, must plead and prove the evidence before the department from which the mistake resulted, the particular mistake that was made, the way in which it occurred, and the fact that, if it had not been made, the decision would have been otherwise, and the patent would not have issued to the patentee, before any court can enter upon the consideration of the original issue of fact determined by the department.

4. EQUITABLE TITLE NOT DEVESTED BY SUBSEQUENT RULES OR DECISIONS OF DEPARTMENT.

The equitable title to land acquired by a lawful entry cannot be devested or affected by subsequent decisions of the land department, or subsequent rules or modification of rules of practice therein.

5. ENTRY OF PUBLIC LAND, WHETHER VOID OR VALID, WITHDRAWS IT FROM SALE UNTIL CANCELED.

The entry of public land under the laws of the United States, whether legal or illegal, segregates it from the public domain, appropriates it to private use, and withdraws it from subsequent entry or acquisition until the prior entry is officially canceled and removed.

6. RULES OF PRACTICE OF DEPARTMENT MAY BE ABROGATED BY FORMAL REPEAL AND PUBLICATION THEREOF ONLY, AND NOT BY DECISIONS IGNORING OR VIOLATING THEM IN PARTICULAR CONTESTS.

Rules of practice of the land department formally established and promulgated by authority of the secretary of the interior, can be repealed or abrogated by like formal action and publication only. Decisions or opinions of the secretary and the commissioner in contests between claimants for specific tracts of land ignoring or violating rules neither repeal nor modify them.

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[1] Conclusiveness of decisions of land department, see notes to Hartman v. Warren, 22 C. C. A. 38; Carson City Gold & Silver Min. Co. v. North Star Min. Co., 28 C. C. A. 344.

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7. UNDER THE RULES OF THE DEPARTMENT IN 1889 LAND IN CONTEST WAS WITHDRAWN FROM ACQUISITION OR ENTRY UNTIL THE DECISION OF THE SECRETARY OR COMMISSIONER AVOIDING THE PRIOR ENTRY WAS OFFICIALLY COMMUNICATED TO THE LOCAL LAND OFFICERS.

The rule of practice of the land department that after the local land officers made their reports to the commissioner of a contest over an entry of land they should "thereafter take no further action affecting the disposal of the land in contest until instructed by the commissioner" was in force in 1889, and it prohibited the acquisition of any legal or equitable right to the land through the local land officers during the time between the date of a decision or judgment of the secretary or commissioner canceling the prior entry and the receipt by the local land officers of official notice of that judgment as well as during the time between the making of the original reports of the contest and the date of the decision.

8. FACTS OF THIS CASE AND RULING.

On February 18, 1889, the secretary of the interior decided that a prior entry of a certain tract of land was void, and that the land was open to disposal under the land laws. This decision was communicated to the local land officers on February 22, 1889. On February 19, 1889, A. made an application to the local officers to enter the land. B. was the first applicant to enter it after the local officers received official notice of the decision canceling the prior entry. The secretary decided that A. acquired the superior right to the land, and issued a patent in accordance with this conclusion. *Held*, this decision was a clear error of law, and B., the first applicant after the local officers were officially notified of the decision, was entitled to a decree charging the title under the patent with a trust for his benefit.

9. ONE WHO CONDUCTS LITIGATION IN ANOTHER'S NAME IS ESTOPPED BY THE JUDGMENT THEREIN.

A party who institutes and conducts a litigation in another's name is as conclusively estopped by the decision and judgment therein from again litigating the same issues with his adversary as is the party in whose name he carries on the contest.

10. ESTOPPEL OF JUDGMENT—EXTENT.

In an action between the same parties or those in privity with them upon the same claim or demand, a decision upon the merits is conclusive not only as to every matter offered, but as to every admissible matter which might have been offered, to sustain or defeat the claim or demand. But in a case in which the second litigation is upon a different claim or demand the prior judgment is an estoppel as to those matters in issue or points in controversy which were actually litigated and decided, and upon which the finding or judgment was based.

11. ESTOPPEL IN PAIS BY DISCLAIMER OF TITLE.

As against an innocent purchaser of Porterfield scrip, the government, and, a fortiori, a stranger, are estopped from claiming that the government is the owner, or that the land warrant is invalid, because a former owner twice tendered it to the United States in payment for a cash entry and patent of land, and the government twice refused to accept it.

(Syllabus by the Court.)

Appeals from the Circuit Court of the United States for the District of Minnesota.

These appeals challenge decrees to the effect that the appellants hold their title to the N. W. ¼ of the S. E. ¼ of section 30, in township 63 N., of range 11 W. of the fourth P. M., in the state of Minnesota, in trust for the appellees. The decree in the suit first named evidences the result of the trial of the issues tendered by the bill in equity which was sustained by this court in Iron Co. v. James, 32 C. C. A. 348, 89 Fed. 811. Subsequent to the commencement of that suit the Germania Iron Company conveyed its interest in the land to the Midway Company, a corporation, and another suit was brought by that company against James Belden, who had succeeded to the interest of some of the defendants in the earlier suit. The second suit rests upon the

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same basis as the first, and the only new issue of any importance that it tenders is the bona fides of Belden's purchase. The two suits were heard and decided together below, and they will hereafter be treated as one in this court.

This litigation is a contest between the Midway Company, the appellee, which claims an equitable title, and Houghton E. James, James Belden, and Charles W. Hillard, the appellants, who hold the legal title, to the land in dispute under a patent issued to William Craig on October 23, 1896. On February 18, 1889, this land was, and long had been, segregated from the public domain, and appropriated to private use by the previous location of Sioux half-breed scrip upon it. A contest had arisen over it between the locator of the scrip and one who applied to pre-empt the land, had been heard by the local land officers, and had, by proper appeals, been presented to the secretary of the interior for decision. On that day the secretary filed a decision directed to the commissioner of the general land office in which he held that the location of the scrip was invalid, that the attempted pre-emption was fraudulent and void, and that the judgment of the department was that the land in question was open to disposal under the public land laws of the United States applicable thereto. The local land officers at Duluth were first officially informed of this decision on February 22, 1889, which was a holiday, and on the morning of February 23, 1889, before opening their office for business, the entry of this land with the Sioux scrip was first canceled on the books and plats of the local land office. They opened their office promptly at 9 o'clock on the morning of that day. There was a large crowd of people besieging the office and waiting to secure this 40 acres of land, and when the door was open Emil Hartmann in person and Warren N. Draper in the name of Charles P. Wheeler each applied to enter it with Porterfield land warrants. The register and receiver found that Hartmann's application was first in time, and accepted and allowed his entry. The appellee has succeeded to the interest thus secured by Hartmann. After the decision of the secretary on February 18, 1889, and again on February 19, 1889, Houghton E. James applied to the local land officers at Duluth to make a homestead entry of this land, and they rejected his application because the land was covered by the prior entry with Sioux scrip. In this state of the case a contest arose between Hartmann, Wheeler, and James for this land, and this contest was carried by appeals to the secretary of the interior, who, on December 21, 1894, decided that the attempted homestead entry by James before the decision of February 18, 1889, was officially communicated to the local land officers, and before the entry with the Sioux scrip had been canceled on their books and plats was valid and effectual, and entitled to priority over the entry of Hartmann. In pursuance of this decision Hartmann's entry was canceled, and James entered the land as a homestead on August 6, 1895. On September 23, 1895, pursuant to an agreement made between him and Warren N. Draper, an attorney at law, James relinquished his claim to this land to the United States, and William Craig entered it with Porterfield land warrant No. 75. Three days later Craig and his wife, at the suggestion of Draper, made a mining lease of the land for 50 years to Joseph H. Chandler, an attorney at law. On the same day Craig and his wife conveyed an undivided half of the land to Houghton E. James. James received $6,500 and this deed for his relinquishment. On October 10, 1895, Chandler assigned the mining lease to the appellee C. W. Hillard. On February 5, 1896, Craig and his wife conveyed their remaining half of the land to James Belden for $12,000, subject to the mining lease; and on March 16, 1898, James gave to Belden an option to purchase his half of the land. In its pleadings and at the hearing the appellee insisted: (1) That the secretary, in his decision of December 21, 1894, found that Hartmann was the first to apply to enter the land after the cancellation on February 23, 1889, of the prior entry of it with the Sioux scrip; (2) that he failed to secure a patent to it for the sole reason that the secretary erroneously held the law to be that an application to enter land after a decision of the secretary that a prior entry is invalid, and before that decision is communicated to the local land officers, and before the prior entry is canceled on the books of their office, is superior in right to the first entry after such cancellation; and (3) that the appellants were the privies of the

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parties to that decision, and were bound by it. The appellants contended that the secretary never found the fact that Hartmann was the first to apply to enter the land after the cancellation of the prior entry on the books and plats; that they were not parties or privies to that decision, but were bona fide purchasers under an independent title without notice of Hartmann's equities, and that the secretary fell into no error in his decision of the question of law. The court below sustained the claims of the appellee, and entered decrees accordingly.

Frank B. Kellogg and James K. Redington, for appellants.

Walter Ayers (P. H. Seymour, on the brief), for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The land department of the United States is a quasi judicial tribunal, invested with authority to hear and determine claims to the public lands subject to its disposition, and its decisions of the issues presented at such hearings are impervious to collateral attack, and presumptively right. A patent to land of the disposition of which the department has jurisdiction is both the judgment of that tribunal and a conveyance of the legal title to the land. 9 Stat. 395, c. 108, § 3; Rev. St. §§ 441, 453; U. S. v. Winona & St. P. R. Co., 67 Fed. 948, 955, 15 C. C. A. 96, 103, 32 U. S. App. 272, 283. But the judgment and conveyance of the department do not conclude the rights of the claimants to the land. They rest on established principles of law and fixed rules of procedure, which condition their initiation and prosecution, the application of which to the facts of each case determines its right decision; and, if the officers of the land department are induced to issue a patent to the wrong party by an erroneous view of the law, or by a gross or fraudulent mistake of the facts, the rightful claimant is not remediless. He may avoid this decision, and charge the legal title derived from the patent which they issue with his equitable right to it on either of two grounds: (1) That upon the facts found, conceded, or established without dispute at the hearing before the department its officers fell into an error in the construction of the law applicable to the case which caused them to refuse to issue the patent to him, and to give it to another (Bogan v. Mortgage Co., 63 Fed. 192, 195, 11 C. C. A. 128, 130, 27 U. S. App. 346, 350; U. S. v. Winona & St. P. R. Co., 67 Fed. 948, 958, 15 C. C. A. 96, 106, 32 U. S. App. 272, 288; U. S. v. Northern Pac. R. Co., 95 Fed. 864, 870, 37 C. C. A. 290, 296; Cunningham v. Ashley, 14 How. 377, 14 L. Ed. 462; Barnard's Heirs v. Ashley's Heirs, 18 How. 43, 15 L. Ed. 285; Garland v. Wynn, 20 How. 6, 15 L. Ed. 801; Lytle v. Arkansas, 22 How. 193, 16 L. Ed. 306; Lindsey v. Hawes, 2 Black, 554, 562, 17 L. Ed. 265; Johnson v. Towsley, 13 Wall. 72, 85, 20 L. Ed. 485; Moore v. Robbins, 96 U. S. 530, 538, 24 L. Ed. 848; Bernier v. Bernier, 147 U. S. 242, 13 Sup. Ct. 244, 37 L. Ed. 152); or (2) that through fraud or gross mistake they fell into a misapprehension of the facts proved before them, which had the like effect (Gonzales v. French, 164 U. S. 338, 342, 17 Sup. Ct. 102, 41 L. Ed. 458). If he would attack the patent on the latter ground, and avoid the department's finding of facts, however, he

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must allege and prove not only that there was a mistake in the finding, but the evidence before the department from which the mistake resulted, the particular mistake that was made, the way in which it occurred, and the fraud, if any, which induced it, before any court can enter upon the consideration of any issue of fact determined by the officers of the department at the hearing. U. S. v. Northern Pac. R. Co., 95 Fed. 864, 870, 882, 37 C. C. A. 290, 296, 308; U. S. v. Atherton, 102 U. S. 372, 374, 26 L. Ed. 213; U. S. v. Budd, 144 U. S. 154, 167, 168, 12 Sup. Ct. 575, 36 L. Ed. 384; U. S. v. Mackintosh, 85 Fed. 333, 336, 29 C. C. A. 176, 179, 56 U. S. App. 483, 490; U. S. v. Throckmorton, 98 U. S. 61, 66, 68, 25 L. Ed. 93; Marquez v. Frisbie, 101 U. S. 473, 476, 25 L. Ed. 800; Steel v. Refining Co., 106 U. S. 447, 451, 1 Sup. Ct. 389, 27 L. Ed. 226; French v. Fyan, 93 U. S. 169, 172, 23 L. Ed. 812; Ehrhardt v. Hogaboom, 115 U. S. 67, 69, 5 Sup. Ct. 1157, 29 L. Ed. 346; Heath v. Wallace, 138 U. S. 573, 575, 11 Sup. Ct. 380, 34 L. Ed. 1063; Barden v. Railroad Co., 154 U. S. 288, 14 Sup. Ct. 1030, 38 L. Ed. 992. The bill in the case before us is based on the first ground. The complainant alleged that the facts were, and that the secretary of the interior at the final hearing before him on December 21, 1894, found them to be, that Hartmann was the first qualified applicant for the land after the prior entry of it with Sioux scrip was canceled on the books and plats at the local land office at Duluth on February 23, 1889, and after the local land officers were officially informed of the decision of the secretary of the interior of February 18, 1889, to the effect that the prior entry was void; that James' application to make a homestead entry of the land was made on February 19, 1889, three days before the local officers received official notice of the decision, while the land was still covered by the prior entry, and four days before it was canceled by the local officers; and that upon this state of facts he erroneously held the law to be that James acquired the superior right to the land in violation of an established rule, a settled practice, and a long line of decisions of the land department that no rights to enter or to secure the entry of land covered by a prior entry can be acquired by strangers to the litigation at the local land office before the decision of the invalidity of the prior entry is officially communicated to the local land officers, and the prior entry is canceled on the books and plats in their office. The complainant also alleged that all the parties who have claimed or do claim this land under James or Craig took their interest in it with notice of this decision and of the complainant's equitable title to the land. Upon the demurrer to this bill this court held that its allegations stated a strong and manifest equity in the complainant, which charged the legal title under the patent with a trust in its favor, and entitled it to the relief it sought. Iron Co. v. James, 89 Fed. 811, 817, 818, 32 C. C. A. 348, 354, 355, 61 U. S. App. 1, 10. Answers to the bill have since been interposed, the case has been heard on its merits, and the court below has found that the averments of the bill are sustained by the proof, and has granted decrees accordingly.

The only question, therefore, which is left for consideration is whether or not this finding is sustained by the evidence, and it comes

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here with the presumption of soundness and with the burden on the appellants to show its error. Mann v. Bank, 86 Fed. 51, 53, 29 C. C. A. 547, 549, 57 U. S. App. 634, 637; Tilghman v. Proctor, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664; Kimberly v. Arms, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764; Furrer v. Ferris, 145 U. S. 132, 134, 12 Sup. Ct. 821, 36 L. Ed. 649; Warren v. Burt, 58 Fed. 101, 106, 7 C. C. A. 105, 110, 12 U. S. App. 591, 600; Plow Co. v. Carson, 72 Fed. 387, 388, 18 C. C. A. 606, 607, 36 U. S. App. 448, 456; Trust Co. v. McClure, 78 Fed. 209, 210, 24 C. C. A. 64, 65, 49 U. S. App. 43, 46; Exploration Co. v. Adams (C. C. A.) 104 Fed. 404, 408.[2] They attack it on three grounds: (1) That there was no rule, practice, or line of decisions in the land department to the effect that strangers to litigation therein could not acquire rights to land at the local land office after the decision of the secretary or land commissioner that a prior entry was void, and before its communication to the local land officers, and their cancellation of the entry on their books and plats; (2) that the secretary did not in his decision of December 21, 1894, find that Hartmann was the first qualified applicant to enter the 40 acres here in controversy after the cancellation of the prior entry; and (3) that, if he did, the appellants are bona fide purchasers of the land under an independent title, and are not bound by the finding. Was there such a rule, practice, or line of decisions on February 23, 1889, when the rights of Hartmann, Wheeler, and James to this land, whatever they were, became fixed and vested? Many questions have been argued and many decisions have been cited in the briefs of counsel which have little, if any, relevancy to this question; and, before discussing it, some of these will be briefly mentioned and their immateriality noticed. The rights of these parties vested on February 23, 1889. They were initiated under and conditioned by the laws of the land and the rules and practice of the department on that day, and no subsequent rules, decisions, or practice could devest them of the property they then secured, or deprive them of their equitable or legal rights to the title to the land which they then acquired. Cornelius v. Kessel, 128 U. S. 456, 461, 9 Sup. Ct. 122, 32 L. Ed. 482; Shreve v. Cheesman, 69 Fed. 785, 792, 16 C. C. A. 413, 419, 32 U. S. App. 676, 689. For this reason the subsequent practice and decisions of the department, which have been carefully considered, will not be reviewed at length in this opinion, but will be here laid aside with the remark that they are without legal effect upon the issues in this case, and their examination has proved futile and profitless. Much has been said and written to prove that the decision of the secretary of February 18, 1889, was a final judgment of the land department, and that it took effect when rendered. The case in which that decision was made was a contest between Orilie Stram and Angus McDonald. Conceding, but not deciding, that the secretary's decision was a final judgment of the invalidity of their claims against the United States and against each other, the crucial question in this case still remains unanswered. That question is whether or not, under that decision, the prior entry of Orilie Stram

[2] 45 C. C. A. 185.

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was removed from the land, and it was opened to acquisition by strangers to that contest, under the rules and practice of the department before the local land officers canceled the entry, or were informed of the decision. None of the parties to this litigation were parties to that contest, and the question is not the finality of that judgment, but the time when after that decision, under the rules and practice of the department, the land became open to acquisition by strangers. For this reason the question of the finality of that judgment is not material to the real issue in this case, and it will be here dismissed with the note that, conceding its finality, it was the judgment of an appellate tribunal; it was in the form of a letter directed to the officer from whose decision the appeal was taken; it closed with words which show beyond doubt that the secretary never intended that the land should be acquired by any one in violation of the rules or practice of the department; and by all analogy such a decision of an appellate court has no effect in the inferior tribunal, where rights and contests are initiated until it is received and acted upon by that tribunal. Iron Co. v. James, 89 Fed. 816, 32 C. C. A. 353, 61 U. S. App. 9. The closing words of the letter to the commissioner which embodied the decision were:

"This disposes of all the claims to the land, so far as disclosed by the record before me, and leaves the land in question open to disposal under the public land laws of the United States applicable thereto, and such is the judgment of this department. The papers in the case are herewith returned."

Turning now to the question at issue, the following propositions will be found to be established beyond controversy: The entry of the land by Stram with his half-breed scrip, whether valid or void, segregated it from the public domain, and appropriated it to private use, so that no legal entry of it could be made by James, or by any other applicant, before the local land officers received notice of the decision of the secretary, and canceled it on their books and plats. Hartman v. Warren, 76 Fed. 157, 160, 22 C. C. A. 30, 33, 40 U. S. App. 245, 250; Wilcox v. Jackson, 13 Pet. 498, 513, 10 L. Ed. 264; Witherspoon v. Duncan, 4 Wall. 210, 218, 18 L. Ed. 839; Carroll v. Safford, 3 How. 441, 11 L. Ed. 671; Railway Co. v. Dunmeyer, 113 U. S. 629, 5 Sup. Ct. 566, 28 L. Ed. 1122; Railroad Co. v. Whitney, 132 U. S. 357, 10 Sup. Ct. 112, 33 L. Ed. 363; McIntyre v. Roeschlaub (C. C.) 37 Fed. 556; Railroad Co v. Forseth, 3 Land Dec. Dep. Int. 446, 447; Railroad Co. v. Leech, Id. 506; Hollants v. Sullivan, 5 Land Dec. Dep. Int. 115, 118; In re Milne, 14 Land Dec. Dep. Int. 242. There was a rule, a practice, and a long line of decisions of the department in force in 1889 to the effect that the register and receiver of the local land office could neither allow an entry, receive an application, nor do any other act affecting the disposition of land after an entry of it had been allowed, and while a contest over it was pending and undecided. Smith v. Oakes, 1 Land Dec. Dep. Int. 181; Hawker v. Fowlks, 2 Land Dec. Dep. Int. 53; Hoyt v. Sullivan, Id. 283; In re Fritzsche, 3 Land Dec. Dep. Int. 208; Keith v. Townsite of Grand Junction, Id. 431; Gilbert v. Spearing, 4 Land Dec. Dep. Int. 463; Grove v. Crooks, 7 Land Dec. Dep. Int. 140; In re Peterson, 8 Land Dec. Dep. Int. 121. Counsel for the appellants admit the soundness and force of these po-

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sitions, and they also concede that after the decision of a pending contest, and before receipt of official notice of it by the local land officers, the latter could not legally allow an entry of the land under the established rules and practice of the department. Their contention is, however, that the rule and practice of the department was that while, during the interim between the decision above and its receipt below, the local officers could not lawfully allow an entry, it was their legal duty to receive and hold all applications to enter tendered to them until they received notice of the decision, and canceled the prior entry, and then to give preference in the entry to the first application presented after the date of the decision, and before notice of it was communicated. In other words, their position is that, while the local officers had no authority to allow an entry, they had the power to allow an acquisition of the land between the date of the decision and their receipt of official information of it. Such a rule and practice, if it existed, was pernicious, and in the teeth of the policy and provisions of the land laws of the United States, for the reasons stated more at length in the opinion upon the demurrer in 32 C. C. A., at pages 350–352, 89 Fed., at pages 814, 815, a perusal of which here is invoked. It was pernicious because it gave the preference over the citizens of the vicinage to a sentinel stationed in the secretary's office at Washington, more than 1,000 miles away, and presented facile opportunities for secret, mischievous, and scandalous machinations. It was inconsistent with the policy and terms of the land laws because it permitted the acquisition of land without record thereof, and made the right to acquire it dependent not upon the state of the records in the local land office, which were open to examination, and easy of access to the citizens of the district in which it was situated, but upon the earliest information of a decision filed more than 1,000 miles away, which few, if any, of the citizens of the neighborhood would have a chance of obtaining, when the theory and provisions of the land laws are that a clear and open record of the acquisition of every right to land through the land department shall be immediately made in the books and plats in the local land office of the district in which the land is situated, that the state of the title and of the claims to the public land shall always be of record and open to the inspection of the people in the local land office, and that every citizen of the vicinage shall thus have equal notice of opportunities to obtain and equal chance to secure any tract of public land in his district. 2 Stat. 73, c. 55, §§ 7, 8; Rev. St. §§ 2223, 2247, 2295. It was the converse of this contention—the rule and practice that the land remained withdrawn from acquisition at the local land office until the decision of the secretary that the prior entry was void was officially made known to the local officers and until the notation of its cancellation was made on their plats and records—which the court below found to exist on February 23, 1889. Does the record sustain this finding? Counsel for appellants maintain that this is a question of fact; that the decision of the secretary on December 21, 1894, found that no such rule or practice existed; and that, therefore, this issue is not open for the consideration of the courts. If the premise of this argument were sound, the conclusion would be inevitable. But the record discloses

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the fact that the issue here is not whether or not certain written or printed rules were adopted, or certain decisions rendered, but it is, what was the true construction and legal effect of certain rules and decisions of the department whose existence on February 23, 1889, all parties admitted at the trial before the secretary in 1894, and conceded in the hearing before the court below? That inquiry presents no issue of fact, but a clear question of law, which our system of jurisprudence has imposed upon the courts the duty of considering and deciding.

The principles and rules to which reference has already been made and the following rules and decisions of the land department condition the determination of this issue. On December 1, 1875, the commissioner of the general land office, in a circular to the registers and receivers of the United States land offices, wrote concerning investigations of the rights of contesting claimants to land that "the observance of certain fixed general rules will tend to promote uniformity and dispatch in proceedings, and will materially aid registers and receivers in the performance of this delicate and highly important duty," and announced that the following rule regarding contested cases had been adopted by the department:

"Having carefully taken and examined the evidence, the register and receiver will render thereon their joint report and opinion, with full and specific reference to the posting and annotations upon their records, subject to the appeal hereinafter provided in these regulations, and will forward the entire record to the general land office, with a brief letter of transmittal, describing the case by its title, the nature of the contest, and the tract involved, and thereafter take no further action affecting the disposal of the land until instructed by the commissioner."

2 Copp, Landowner, pp. 154, 155.

On January 8, 1878, the commissioner of the general land office issued a circular to the registers and receivers, which contains these words:

"Gentlemen: By direction of the honorable secretary of the interior, dated the 22d ultimo, your attention is called to the practice prevailing at many district offices of admitting entries and filings upon papers prepared and left in the hands of registers and receivers, and of attorneys practicing before them, prior to the cancellation of an invalid entry under a pending contest or relinquishment, by which practice parties hope and expect to secure a priority of right by having the entry allowed immediately upon the receipt of notice of cancellation. The receipt of such applications and declaratory statements is not authorized by law or by your instructions, and must be discontinued. In the general circular of May 18, 1876, page 6, paragraph 19, respecting the presentation of applications after contest, it is provided that the contestant 'must, if he desires the land, by proper diligence ascertain when notice of cancellation is received by the register and receiver, and then make formal written application for the tract; the land, after reception by said officers of notice of cancellation, being always open to the first legal applicant, unless withdrawn from entry by competent authority.' This instruction will be found also on page 7 of the revised circular of December 1, 1877. Its purport is plain to the effect that an application, to be valid, must be made at a time when the land is free from appropriation, and legally subject to entry, and no other should be considered."

4 Copp, Landowner, p. 167.

On October 9, 1878, the commissioner issued another circular to the local land officers, in which he announced that the revised rules of

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practice embodied therein had been adopted by the department. This revision contains a verbatim copy of the rule of 1875 which has been quoted above. 7 Copp, Landowner, p. 153. This rule remained in force without abrogation or substantial modification from 1875 until after 1889. In a revision of the rules issued in 1885 it appears in three rules numbered 51, 52, and 53, and they read:

"Rule 51. Upon the termination of a contest the register and receiver will render a joint report and opinion in the case, making full and specific reference to the postings and annotations upon their records.

"Rule 52. The register and receiver will promptly forward their report, together with the testimony and all the papers in the case, to the commissioner of the general land office, with a brief letter of transmittal, describing the case by its title, the nature of the contest, and the tract involved.

"Rule 53. The local officers will thereafter take no further action affecting the disposal of the land in contest until instructed by the commissioner."

In Crystal v. Dahl, Copp, Pub. Land Laws (1869–1875) 316, and Eno v. McDonald, Id. 317, the secretary of the interior decided that no rights to land could be initiated between the date of a decision of the commissioner holding a prior entry void and the receipt of notice of it by the local land officers. In the latter case the decision that the prior entry was void was rendered on October 16, 1872. It was received at the local office on October 29, 1872. One McDonald alleged settlement on October 26, 1872. The secretary said:

"The cancellation of the prior homestead entry took effect when notice of such cancellation was received at the local office, and then, and not till then, was the land subject to entry and settlement. Crystal v. Dahl, Secretary's Decision April 13, 1872. 2 Op. Asst. Attys. Gen. p. 5."

The rule announced in this case in 1874 was recognized as the established practice of the department in 1880 in Jayne v. Gowdy, 7 Copp, Landowner, 137; in 1883 in Pomeroy v. Wright, 2 Land Dec. Dep. Int. 164; and in 1888 in Perkins v. Robson, 6 Land. Dec. Dep. Int. 828.

Counsel for the appellants rely upon the decisions in the following cases to support their proposition that this rule and the practice disclosed by the decisions in Crystal v. Dahl and Eno v. McDonald are inapplicable to the case in hand, and that they were abrogated prior to 1889; Pomeroy v. Wright, 2 Land Dec. Dep. Int. 164; Ryan v. Conley, 4 Land Dec. Dep. Int. 246, 248; In re Reed, 6 Land Dec. Dep. Int. 563; Barclay v. California, Id. 699; Anderson v. Railroad Co., 7 Land Dec. Dep. Int. 163. Bearing in mind that the rule was that, after sending forward their reports in a contested case, the register and receiver should "take no further action affecting the disposal of the land in contest until instructed by the commissioner," and that the issue here involves its application not to claims of parties to the contest, but to those of strangers to it, let us see if there is anything in these decisions which repealed or modified this rule or the practice which had certainly grown up in conformity with it.

Pomeroy v. Wright, 2 Land Dec. Dep. Int. 164, which was decided in 1883, involved the rights of the parties to the original contest, not the right of strangers to such a contest. It involved the time when the right of the defeated entryman to purchase the land under the act of June 15, 1880, expired, and the right of the successful contestant

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to enter it under the act of May 14, 1880, accrued. The secretary held that the decision of the commissioner was a final judgment between the parties to such a contest, and that the right of the one ceased and that of the other accrued at its date. But this decision rests upon the special provisions of the acts of congress mentioned above, and does not determine when the rights of strangers to the contest accrue. It distinguishes the case in which it is rendered from those governed by rule 53, and expressly concedes the existence of the general rule and of the practice which it prescribes. The secretary says:

"Nor is there any conflict between the rule laid down here and the established rule of the land department, referred to by counsel for Wright and in your decision aforesaid, that cancellation takes effect by a formal act at the local office. That rule is made for a different purpose, and is founded on another law, or construction of law, which reserved all land covered by an entry, and declares it not to be 'public land.' When the entry is canceled in fact, the reservation is removed, and the land is restored to the public domain."

It would be difficult to conceive of more conclusive proof of the rule and practice found by the court below than these remarks of the secretary, and the fact that the commissioner in his decision which the secretary was reviewing cited and followed it. And it is interesting to note, although the fact has no relevancy to the issues in this case, that, after numerous conflicting decisions, the department has finally practically applied the provisions of rule 53 to the rights of claimants under the acts of June 15 and May 14, 1880. Stewart v. Peterson, 28 Land Dec. Dep. Int. 515, 519.

Ryan v. Conley, 4 Land Dec. Dep. Int. 246, 248, decided in 1885, was a case in which the decision forfeiting the prior entry was made by the local officers themselves, so that it was within their knowledge and in their office ever after it was rendered, but they failed for some time to note upon their records the cancellation which they had adjudged. The secretary simply held that their failure to perform the clerical act of noting the cancellation on the plats and records did not withhold the land from entry. No provision of rule 53 was violated or affected by this ruling, because the contest had never been sent to the commissioner, and the rule had no application to the case.

In the case of In re Reed, 6 Land Dec. Dep. Int. 563, decided in 1888, there is an obiter dictum of the secretary in accord with the contention of counsel for the appellants. He there says that a decision of the commissioner on December 27, 1884, canceling the entry of George G. Reed, was a final judgment which opened the land to subsequent entrymen, and that, consequently, the application of John H. Reed to enter the land on January 23, 1885, should have been allowed. But the decision of the commissioner of December 27, 1884, had been received by the local land officers, and they had canceled the prior entry of George G. Reed on January 5, 1885, 18 days before John H. Reed applied to make his entry, so that there was no question of the right to enter the land after the decision and before its official communication involved in the case. The truth is that the secretary was not considering or discussing this question, but was arguing and deciding the issue whether or not an entry could be permitted after a

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decision and before the expiration of the time allowed for an appeal, and it was with reference to that question and that time only that he suggested the dangerous practice which counsel seek to establish as a general rule in these words:

"In such cases the proper practice would be to receive the application subject to the right of appeal, but not to allow the entry to be made of record until the rights of the former entryman have been finally determined, either by the expiration of the time allowed for appeal or by the judgment of the appellate tribunal."

The opinion in Barclay v. California, 6 Land Dec. Dep. Int. 699, filed in 1888, merely holds, on the authority of the Reed Case, that a deficiency used as the basis of a selection of school-indemnity lands is freed from the date of a decision canceling the selection so that it may be used as the basis of another selection, although the time to appeal from that decision has not expired. The case did not involve the power of local land officers to receive applications, and violate rule 53, nor was that question discussed or referred to in any way.

In Anderson v. Railroad Co., 7 Land Dec. Dep. Int. 163, decided in 1888, the secretary held, on the authority of the obiter dictum in the Reed Case, without discussing the question, or referring to rule 53, or the practice under it, that the decision of the commissioner canceling an entry took effect from its date, and before the cancellation was entered in the local land office, so that the filing of the line of definite location of the St. Paul & Pacific Railroad meanwhile vested the right to the land in the railroad company. Even this decision, however, in no way violates or modifies rule 53, because the map of definite location was not filed with the local land officers, but in the office at Washington; and the local officers neither took, nor were they asked to take, any action affecting the disposal of the land before they received the decision.

This completes the recital of the rules and decisions which condition the determination of the question before us, and we are now ready to enter upon its decision. It is earnestly contended that there is a marked distinction between the cases in which a cancellation of an entry is adjudged by the secretary or commissioner and those in which the decision is that the entry shall be held for cancellation, that in the former class the register and receiver are empowered to receive applications before they are officially notified of the decision, while in the latter class they may not. But this is a distinction without reason and without a difference, born of the zeal and ingenuity of counsel, and first found in the books in the erroneous decision of the secretary in this case on December 21, 1894. The rule forbade any action by the local officers affecting the disposal of the land until instructed by the commissioner, and under it they were as peremptorily prohibited from acting after a judgment of cancellation above, and before the commissioner informed them of and instructed them concerning it, as they were from acting under a decision holding an entry for cancellation before they were informed of it. The mischief to be remedied and the purpose of the rule were the same in the one case as in the other, and the rule itself was without exception, and alike applicable to both.

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It is sometimes claimed in the briefs for the appellants that the mere receipt of applications to enter land and the subsequent allowance to the first applicant of a preferential right of entry when the decision is received is not a violation of rule 53, because it does not allow an entry before the receipt of notice of the decision; but such a practice allows the acquisition of an absolute right to the land by the first applicant, and thus, in effect, disposes of the land before notice of the decision, in flagrant violation of the rule. The review of the rules and decisions of the land department in which we have indulged conclusively demonstrates the facts that on February 23, 1889, when Hartmann filed his application, there was, and there had been for 14 years prior to that time, a printed rule of the department to the effect that, after the reports of the register and receiver upon a contest over an entry had been forwarded to the commissioner, those officers should take no further action affecting the disposal of the land until instructed by the commissioner; that the practice of the department had conformed to the rule; that there had been no decision of the department which, after consideration or discussion of the rule, had modified it or limited its effect; that the few opinions cited against it do not mention or refer to the rule, and are either devoted to the determination of other questions or to a repetition of the obiter dictum in the Reed Case. In this state of the case, what was the true construction and legal effect of this rule on February 23, 1889? Even if the opinions cited against it had decided that the rule was abrogated or limited, they would have been nothing more than erroneous judgments. They could not have affected the rule. Their only effect would have been to have caused the issue of the patents to the particular tracts of land whose title was in question in them to the wrong party. Nothing short of an express and formal repeal or abrogation of the rule and public notice thereof by the secretary, who alone had the power to establish and overthrow rules, could have destroyed its force or limited its terms. Rev. St. §§ 453, 2478. All the authorities were that this rule, and a practice in confromity with it, obtained during the pendency of a contest, and all that discussed the question were that it continued in force until the decision of the secretary or commissioner was officially communicated to the local land officers. Crystal v. Dahl, Copp, Pub. Land Laws (1869–1875) 316; Eno v. McDonald, Id. 317; Jayne v. Gowdy, 7 Copp, Landowners, p. 137; Pomeroy v. Wright, 2 Land Dec. Dep. Int. 164; Perkins v. Robson, 6 Land Dec. Dep. Int. 828. It may well be for obvious reasons that a failure of the local land officers after receipt of the decision to perform the clerical act of canceling the prior entry on their plats and records promptly in the ordinary course of business would not continue the withdrawal of the land from acquisition or entry, but this question is not presented in the case before us. The evil which the rule was made to remedy, the reason for its adoption, the terms of the rule itself have the same application to the time between the decision of a contest by the commissioner or by the secretary and the receipt of notice of the opinion by the local officers that they do to any of the time during the pendency of the contest. The rule contains no exception of this interim, but broadly covers it with the prohibition that

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"the local officers will thereafter take no further action affecting the disposal of the land in contest until instructed by the commissioner." The conclusion is irresistible that there was a rule and practice of the land department on February 23, 1889, that land involved in contest over a prior entry before the commissioner or secretary remained withdrawn from entry and from acquisition until the decision of the secretary or of the commissioner was officially made known to the local land officers, and the notation of the cancellation of the former entry was made in the ordinary course of business on the plats and records of the local land office. Hartmann had the right to rely upon this rule and practice, and to secure this land in accordance with it; and the allowance by the secretary, in flagrant violation of it, of James' entry upon an application made before the decision canceling the prior entry was officially communicated to the local land officers, was a clear error of law.

The appellee relied upon the record of the decision of the secretary of December 21, 1894, to establish the fact that Hartmann was the first applicant to enter the land on February 23, 1889. The court below held that the secretary so found, that his finding estopped the appellants from again litigating that question, and with that view it disregarded evidence outside of that record which the appellants offered to prove that Wheeler was the first and Hartmann was the second applicant on that morning. These rulings are challenged as error, and, while counsel for appellants concede that the secretary did find in his decision of December 21, 1894, that Hartmann was the first and Wheeler was the second applicant to enter the land on February 23, 1889, they insist that his finding did not render that issue res adjudicata between the appellants and Hartmann, and did not estop them from again litigating that question, (1) because that finding was not made in litigation concerning the land here in issue; (2) because James was not a party to that issue, and that question was not material to the decision of the contest between him and Hartmann; (3) because the appellants now claim under a new and independent title, —the entry of Craig; and (4) because the appellants are neither parties nor in privity with the parties to the litigation before the commissioner, but are bona fide purchasers without notice of that litigation or of the equitable title of Hartmann. The first questions presented by these positions are, what were the issues determined by the secretary in the contest over this land which resulted in his decision in 1894, who were the parties to those issues, and what did the secretary decide? In an action which results in a judgment in a court, the pleadings, orders, opinions, and judgment may be examined to discover the true answer to these questions, and in this contest before the land department the official reports of the registers and receivers thereon, the notices of appeals, the decisions of the commissioner and of the secretary, the entire record of the proceeding exclusive of the testimony, constitute competent evidence from which to ascertain what issues were raised, litigated, and decided in the contest. By the official reports of the registers and receivers made pursuant to rules 67 and 68 of the department, by the notices of appeal, and by the decisions of the commissioner and of the secretary in that

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proceeding these facts are established: On the morning of February 23, 1889, Hartmann applied in writing to enter the 40 acres here in question, hereafter called the "Hartmann 40," with Porterfield scrip, and he also applied to enter the S. E. ¼ of the N. W. ¼ of section 30, township 63 N., of range 11 W., hereafter called the "Wheeler 40," with Valentine scrip. His applications and his scrip for these two tracts were together in one envelope, and in this condition he handed them to one of the local land officers, and his envelope was immediately marked "No. 1" by one of these officers. On the same morning Warren N. Draper, an attorney at law, presented the applications of Charles P. Wheeler to enter these two tracts of land with Porterfield scrip and Valentine scrip, respectively. These two pieces of scrip and the two applications were in one envelope, which Draper handed to one of the local officers, and one of these officers marked this envelope "No. 2." In this way the question who was the first applicant for the two tracts became an indivisible issue, a contest for priority between the two envelopes, which could not by any possibility result in a finding that Hartmann was the first applicant for one and Wheeler for the other tract, and so this issue remained to the end. James had not applied to enter the Wheeler 40, but, as we have already seen, he had made an application for the Hartmann 40 on February 19, 1889, and on February 23, 1889, he again applied to enter the same land upon his application of February 19th, and because that application had remained in the hands of the officers from that date until after Hartmann made his application. The register and receiver found that Hartmann's envelope, containing his applications and scrip for the two 40's, was the first to come to their hands, awarded the two tracts to him, entered them in his name on their plats and records, and reported their findings and conclusion to the commissioner. James appealed from their decision allowing Hartmann to enter the Hartmann 40. Wheeler appealed from their decision allowing Hartmann to enter both 40's. The commissioner ordered the appeals regarding the two tracts to be consolidated in one contest, and directed a single hearing on all the issues presented by all the claimants, in which Hartmann should be the defendant and all the other claimants should be the plaintiffs. This hearing was had. The register and receiver reported. Appeals were taken from their decision to the commissioner, and from his judgment to the secretary, and the latter finally decided on December 21, 1894, that Hartmann's set of applications was first presented to and received by the local officers, and gave him the Wheeler 40, but awarded the Hartmann 40 to James on the ground that the latter's application on February 19, 1889, gave him the superior right to it. In preparing his opinion the secretary first wrote his views concerning the right secured by James through his earlier application, held that James was entitled to the Hartmann 40, and remarked that "the conclusion reached obviates the necessity of considering any of the claims initiated on February 23, 1889, to the tracts herein awarded to Alden and James, and leaves for further examination the claims of Hartmann, Wheeler, and Lawrence initiated February 23, 1889, to the S. E. ¼ of the N. W. ¼ of said section 30," and then wrote his finding

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that the envelope containing Hartmann's applications was the first to reach the local land officers on February 23, 1889, and awarded the Wheeler 40 to Hartmann on that ground.

Counsel for appellants persuasively argue that the issue of the priority of Hartmann over Wheeler was immaterial to the contest between James and Hartmann, and that because the secretary first expressed his view of the prior right of James in writing his decision he never decided the question whether or not Hartmann was the first applicant on February 23, 1889, in that contest. But when the register and receiver allowed Hartmann's entry of both 40's, and made the finding, which all the subsequent decisions confirmed, that his applications and scrip for both 40's were handed to the local officers in one package, while those of Wheeler were handed to them in another, the issues concerning the priority of their applications for these two tracts of land were inextricably fastened together, so that a decision that one was prior in right upon either 40 was a judgment that he was so upon the other. Hence the decision of the secretary that Hartmann was the first applicant on February 23, 1889, for the Wheeler 40 was a finding that he was so for the Hartmann 40 here in issue. It was not material that the secretary's finding upon this issue of fact appeared, in his opinion, subsequent to his decision of the question of law raised by James' application. All the findings and conclusions in the decision were undoubtedly made by the secretary before he commenced to write any of them, and the order in which a judicial officer writes down his findings or conclusions in his opinion is no indication of the order in which he reached them. Was the question whether or not Hartmann was the first applicant on February 23, 1889, a material or necessary issue in his contest with James, and was the latter a party to its litigation and decision? When Hartmann had entered the two 40's under the decision of the register and receiver, James had appealed from that decision as to one, and Wheeler as to both, and the commissioner had ordered a consolidation of the contests involving the two tracts, and a single trial and hearing, in which James and Wheeler should be the plaintiffs and Hartmann the defendant. Under his appeal, James, as well as Wheeler, had the undoubted right to try the issue whether or not Hartmann was the first applicant on February 23, 1889, to prove, if he could, that another was first on that morning, and to defeat and cancel the entry of Hartmann upon that ground. James' appeal challenged Hartmann's right to enter the land, and, while it raised the question of law whether or not James' prior application was valid, it as clearly presented the issue of the priority of Hartmann's application on February 23, 1889. A finding of the latter issue against Hartmann would have been as fatal to his entry as the decision of the question of law against him. Not only this, but the question of law did not and could not arise in the contest between Hartmann and James until the secretary had first found that Hartmann was the first applicant on the morning of February 23, 1889. If he had decided that Hartmann was not first on that day, that finding would have rendered the decision of the question involving James' applica-

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tion of February 19th unnecessary to determine the contest between him and Hartmann; and the fact that he did find, before he commenced to write his opinion, that Hartmann was first, and that fact alone, rendered the decision of the question of law necessary to a disposition of the contest between James and Hartmann. Our conclusion is that the issue whether or not Hartmann was the first applicant for the land in question in this suit on February 23, 1889, was tendered by James when he challenged Hartmann's entry, that that issue was material and necessary to the determination of the contest between James and Hartmann thus instituted, that it was inseparably united with the issue whether or not Hartmann was the first applicant for the Wheeler 40, and that that issue of fact was decided by the secretary in favor of Hartmann in the contest between him and James over the title to the land in question in this suit on December 21, 1894.

There is another reason why that decision renders the issue whether Hartmann or Wheeler was the first applicant for this land res adjudicata between the appellees and the appellants in this case. The record discloses these facts: Charles P. Wheeler had no beneficial title or interest in the application which he made for, or the rights which he acquired in, the 40 acres here in controversy. In making that application and in securing and holding his claim to this land he was the agent and trustee of the Chicago & Minnesota Ore Company, a corporation. That company furnished the scrip and the lawyers to make the application and to conduct the contest in his name. Warren N. Draper was the attorney at law who made the application. In 1891 the Minnesota Iron Company, another corporation, purchased the stock of the Chicago & Minnesota Ore Company, and thereby acquired its interest in the Wheeler claim to this land. Joseph H. Chandler was, and still is, its general counsel. Warren N. Draper was its local attorney at Duluth, and they conducted the contest of Wheeler for the land here in question in behalf of this corporation from that time forth. The decision of the secretary of December 21, 1894, rendered the question of fact whether Hartmann or Wheeler was the first applicant for this land res adjudicata between Hartmann and Wheeler. It went further. It made that issue res adjudicata between Hartmann and his grantees and the Minnesota Iron Company and its agents and trustees, and made the decision of that question by the secretary competent and conclusive evidence of the fact that Hartmann was first in any subsequent litigation between these parties over the same subject-matter. One who institutes and conducts a litigation in another's name is estopped by the decision or judgment therein from again contesting the same issues with his adversary, or those in privity with him, as completely as the party in whose name he carries on the controversy. Lovejoy v. Murray, 3 Wall. 1, 18, 18 L. Ed. 129; Tootle v. Coleman (C. C. A.) 107 Fed. 41.[3] Warren N. Draper, the local attorney, and Joseph H. Chandler, the general counsel, knew the interest of their client, the iron company, in this

[3] 46 C. C. A. 132.

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land, the decision of the secretary, and the right of the iron company to attack that decision in the courts, and to obtain the title to the property in question; and they always claimed that Wheeler was in fact the first applicant on February 23, 1889. This is the claim on which the appellants now rely, and, if it is well founded, the Minnesota Iron Company was entitled to the title to this land on the Wheeler application, and its attorneys must have known it. How, then, can they, or those for whom they purchased, have any title or interest in it for themselves, or for any one but their client? Houghton E. James was one of the adversaries of this client in the litigation before the land officers. William Craig was a friend of Draper, who had no knowledge of the value of this land, and who took no part in the negotiations or transactions about to be related, except to do what Draper advised him to do. Draper purchased of James a relinquishment to the United States of his homestead claim upon the land for $6,500, and for a deed from Craig to him of one-half of the property, subject to a mining lease to Chandler for 50 years. Draper procured some Porterfield scrip with which to pay for the land. On September 23, 1895, pursuant to this agreement, James relinquished his claim. A moment or two later, Draper entered the land in the name of Craig, and paid for it with this Porterfield scrip, which he had obtained. Three days later, on September 26, 1895, Draper caused Craig to give to Chandler a mining lease of the tract for 50 years, and to make a deed of one half of it to James. On February 5, 1896, Craig conveyed his remaining half to James Belden, a young man, who was then about 23 years of age, who was sometimes found in the office of the Minnesota Iron Company in Chicago, and who was a clerk for a stockholder of that company, whose office adjoined that of the corporation. Craig testified in one place that he did not know what he obtained for this deed, and that the proceeds were taken and divided by Draper, by his direction, in settlement of business of a private nature, which he declined to disclose; but in another place he testified that the deed "was for a consideration of $12,000." Joseph H. Chandler negotiated for James Belden the purchase from James of an option to buy his remaining half of the land, and on March 15, 1898, he executed a grant of this option to Belden. On October 10, 1895, Joseph H. Chandler assigned his mining lease for $10,000 to C. W. Hillard, who had been for many years the first vice president of the Minnesota Iron Company. The same attorneys who conducted Wheeler's litigation for this land, with the exception of Draper, who is dead, are defending this suit. In 1897 the president of the Minnesota Iron Company offered to settle this litigation upon a certain basis. Thus, through the negotiations of the attorneys of the Minnesota Iron Company, the mining lease for 50 years has landed in the vice president of that company, and the title under the patent in James, the original homestead applicant, and in James Belden, the young clerk in the office of the stockholder of the iron company. There are many other facts too numerous to mention disclosed by this record, which point in the same direction, and no one can carefully read all the testimony without an abiding conviction that the real party in interest, the real defend-

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ant in this litigation, is the same corporation which conducted the contest in the name of Wheeler in the land office, and which became bound by the decision therein. This conclusion seems to be rendered inevitable by the fiduciary relation which Draper, Chandler, and Hillard and the principals of Draper and Chandler, Craig and Belden, bore to the iron company. All of them but Craig must have had actual knowledge of the interest of the iron company in Wheeler's claim, and of the estoppel of the company and of James by the secretary's decision; and Craig had constructive knowledge of these facts, because the knowledge of his agent, Draper, was his knowledge. Neither Draper, nor Chandler, nor Hillard, nor Belden, nor Craig, nor any other party for whom either Draper or Chandler negotiated a purchase of an interest in this land, could lawfully buy and hold it adversely to the iron company. They all stood in such fiduciary relations to that corporation that any interest which they took necessarily became immediately charged with a trust in favor of that company, and any attempt to hold it adversely would constitute a breach both of faith and of trust. This state of facts compels a choice of two deductions,—either that the attorneys and the vice president of the iron company were faithless to their trust, and were buying for themselves, or for Craig and Belden, who were charged with their knowledge, interests adverse to their client in land which it claimed, or that all these parties, like Wheeler, took their titles and claims as trustees and agents for the corporation, and held them for its benefit. The presumptions of integrity and innocence, the common practice of large corporations to take titles to their property in the names of trusted employés, to which we cannot be blind, and the high character of the lawyers, who conducted and effected all these transactions leave no doubt which of these inferences must be adopted. It is that the appellants are mere trustees or agents for the Minnesota Iron Company, which holds the beneficial interest in and is really conducting this litigation in their names, and that the decision of the secretary that Hartmann was the first applicant for the land on February 23, 1889, renders that question res adjudicata between the latter and their cestui que trust and principal, the iron company.

Nor could the appellants escape from the estoppel of this decision if we were in error in our last deduction, and they were purchasers of the title and the lease they hold for themselves. When Hartmann filed his application and scrip for this land, he placed upon the record a notice that he claimed to be the equitable owner of it, and to charge the title to it in the government with a trust in his favor. From that time forth, if he was the first applicant on February 23, 1889, the United States held the naked legal title in trust for his exclusive benefit. When the decision of the secretary found that issue of priority in his favor, James, Wheeler, and the Minnesota Iron Company, and those claiming title under them, were thereby estopped from again litigating that issue in any suit to establish title to this land between them and Hartmann and his grantees. There have been no purchasers without notice of these facts in this case. Hillard, who was the vice president of the iron com-

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pany for the last three years of its contest in the land department, must have known them; Draper and Chandler, the attorneys who conducted that litigation, knew them; and Craig and Belden, for whom Draper and Chandler purchased all the interests they acquired, were charged with the knowledge of their agents in these purchases. Moreover, they are in fact the mere grantees of James, and, so far as the estoppel of the secretary's decision is concerned, they stand in his shoes. The contention of counsel that Craig, James, Belden, and Hillard are not bound by that decision because they no longer claim this land under the homestead application of James, but under a new and independent title initiated by the entry of Craig, has been examined. But it is impossible to wink so hard as not to see that the only foundation their claim of title has is that same homestead application of James on February 19, 1889, upon which his contest in the land department rested, and that the actual transaction between James and Craig was a transfer of James' claim to Craig, to accomplish which Draper used a relinquishment by the former and an entry by the latter as a substitute for some other method of conveyance. It may be conceded that, if James or the appellants claimed this land under a new and independent title, the decision of the secretary might not conclude them. Nay, more, it may be admitted that that decision does not estop them from litigating any additional rights and claims which they have acquired subsequent to its rendition. The relinquishment of a claim to land as a homestead by one party, and its entry with scrip by another, sounds like, and doubtless often is the initiation of, a new and independent title. But courts of equity look through documents, forms, and appearances, and determine the legal effect of acts and instruments by the actual transaction which they evidence. James entered this land as a homestead on August 6, 1895, under the decision of the secretary of December 21, 1894, that he had acquired the right to do so and the equitable title to the land on February 19, 1889. According to that decision, he held the equitable title to the land on September 23, 1895, when he had the right to transform it into a legal title, and to pay for it by a residence upon the property in accordance with the homestead laws of the United States. For $6,500 and a deed of one-half of it from Craig he relinquished his right to pay for it by residence, and Craig entered, and paid for it with scrip. When these things had been done, Craig held the same equitable title which James had owned before, plus a receipt for payment for the legal title. The only additional acquisition was the perfection of the right to the legal title by the payment, and, if that question of payment was here in issue, the decision of the secretary would not conclude it. Aside, however, from this immaterial question of payment, the actual transaction was, and its only legal effect was, a transfer of the equitable claim of James to Craig. The essential foundation of that claim before the transfer was James' application to enter on February 19, 1889, and the decision of the secretary on December 21, 1894, and the indispensable basis of that claim after the transfer and the entry of Craig was that same application and decision. Strike either down, and the claim of Craig and of his

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grantees is without foundation, and the equitable title of Hartmann prevails. The result is that in reality, in legal effect, Craig, James, Hillard, and Belden are the immediate and remote grantees of James, in privity of estate with him, bound by notice of the equitable title of Hartmann and by the estoppel of the decision of the secretary that Hartmann was the first applicant to enter this land on the morning of February 23, 1889.

For the reasons which have now been stated the conclusion of this court is that in the contest before him the secretary decided on December 21, 1894, that Hartmann was the first applicant to enter this land on the 23d day of February, 1889; that that question was a material and necessary issue between Hartmann and James, and also between Hartmann and Wheeler in that contest; that this suit involves the same cause of action,—the equitable title to the same land there in question between James and Hartmann; that it is between privies in estate with the parties to that contest claiming the title in the same rights, respectively, which were there litigated; that the decision of the secretary rendered the issue of fact whether Hartmann or Wheeler was the first applicant res adjudicata between the parties to this suit, and was competent and conclusive evidence thereof in this litigation. In an action between the same parties, or those in privity with them, upon the same claim or demand, a decision upon the merits is conclusive not only as to every matter offered, but as to every admissible matter which might have been offered to sustain or defeat the claim or demand. But in a case in which the second litigation is upon a different claim or demand, the prior judgment is an estoppel as to those matters in issue or points in controversy which were actually litigated and decided, and upon which the finding or judgment was based. Cromwell v. County of Sac, 94 U. S. 351, 352, 24 L. Ed. 195; Board v. Platt, 79 Fed. 567, 571, 25 C. C. A. 87, 91, 49 U. S. App. 216, 223; Same v. Sutliff, 97 Fed. 270, 273, 274, 38 C. C. A. 167, 170.

The testimony offered by the appellants dehors the record in the contest before the secretary to show that Wheeler was the first and Hartmann the second applicant was properly disregarded by the court below, because they did not plead or offer to prove that the secretary's decision of this question of fact was induced by fraud or mistake, and, in the absence of such pleading and proof, his finding was conclusive. U. S. v. Northern Pac. R. Co., 95 Fed. 864, 870, 882, 37 C. C. A. 290, 296, 308.

Finally, it is said that the Porterfield scrip with which Hartmann applied to enter the land had been exhausted by its use to purchase other land many years before. In 1868, Charles A. Gilman was the owner of this scrip, and he applied to the register of the land office at St. Cloud, Minn., to purchase for cash a certain 40 acres of land, and delivered this scrip to the register in payment for it. The register allowed and reported the entry of the land as a cash entry, and the scrip was sent to the United States treasury in payment for it. The land so entered was not open to private purchase for cash, but was open to the location of this scrip. On the other hand, a cash entry could not be paid for with land warrants. The

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result was that the scrip was returned to Gilman, and the land was patented on the cash entry in 1868. About 17 years later, a deficit was found to exist in the accounts of the receiver of the land office at St. Cloud, because he had obtained no cash for the entry upon which this patent was issued. Gilman again produced the scrip to the receiver to pay this deficit, but the government returned it to him, and he paid for the land in cash. Hartmann subsequently bought the scrip. There are two reasons why these transactions did not invalidate the land warrant in the hands of Hartmann. In the first place, Gilman never succeeded in either locating or paying for his land with the scrip, and the government returned it to him in full force, unused and uncanceled. Conceding that the land which he secured was not open to private entry for cash, yet it was land of the disposition of which the land department had jurisdiction, and in this collateral attack upon the judgment of that department, evidenced by its patent, to the effect that the land could be lawfully sold for cash, its decision is invulnerable. U. S. v. Winona & St. P. R. Co., 67 Fed. 948, 957, 15 C. C. A. 96, 105, 32 U. S. App. 272, 286. In the second place, the United States are the only parties that can claim the ownership or cancellation of this scrip, and they are estopped from doing so by their patent of the land for cash, by their refusal to take the scrip in payment for it, and by their return of it uncanceled. This scrip was assignable, and Hartmann had the right to rely, and doubtless he did rely, upon the result of these acts of the government, upon the absence of any cancellation or marks of location upon the scrip when he purchased it, and neither the government nor strangers to these transactions can successfully attack the validity of or the title to the scrip on their account. U. S. v. Winona & St. P. R. Co., 67 Fed. 948, 960, 15 C. C. A. 96, 108, 32 U. S. App. 272, 291.

All the questions of moment presented by counsel for the appellants in these suits have now been considered and decided, and, conceding the proposition with which they opened their argument,—that it was incumbent upon the appellee to prove by competent evidence the facts necessary to entitle it to the title to the land in question under the rules of law applicable to the case,—the conclusion of the whole matter is that it has done so, that there was no prejudicial error in the rulings or decrees of the circuit court, and that they must be affirmed. It is so ordered.

(107 Fed. 618.)

In re FIECHTL et al.

PETER HAND BREWERY CO. v. SECURITY TITLE & TRUST CO.

(Circuit Court of Appeals, Seventh Circuit. April 20, 1901.)

No. 782.

1. APPEAL—ALLOWANCE.
   Allowance of appeal need not be by a formal order, but may be by approval of appeal bond.

2. SAME—CITATION.
   Citation is not necessary where appeal is taken during the term at which the order appealed from was entered.

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Appeal from the District Court of the United States for the Northern District of Illinois.

Abel L. Allen, for appellant.
M. M. Jacobs, for appellee.

Before WOODS, JENKINS, and GROSSCUP, Circuit Judges.

PER CURIAM. This appeal is from an order entered on March 2, 1901, which concludes with these words: "Whereupon, the Peter Hand Brewing Company, by its solicitors, prays an appeal." On March 6th an order was entered fixing the amount of the appeal bond. On March 11th an order was entered showing the filing at 10 o'clock a. m. of the appeal bond, approved by the judge of the court, and on the same day another entry was made, showing the filing at 12:15 o'clock p. m. of an assignment of errors. On April 6th the district court, on motion of the appellant, "ordered that the time in which to file the record on appeal in the cause be, and hereby is, extended to Tuesday, April 9, 1901, at 11 o'clock a. m." The record was filed here on April 9, 1901.

The Security Title & Trust Company, appearing specially for the purpose of making the motion, has moved to dismiss the appeal for the reasons:

"First. That appellant has failed to perfect its appeal, in that it has not filed any petition with its assignments of error, as required by rule 11 of this court. Second. That no appeal herein has been allowed. Third. That no appeal was prayed or allowed after filing assignments of error. Fourth. That no proper assignments of error have been filed, as required by rule 11. Fifth. That said assignments of error are vague, indefinite, and altogether uncertain. Sixth. That no citation has been issued or served herein as required by the rules of this court."

There was a substantial, though not exact and technical, compliance with the rules regulating the taking of appeals. The allowance of an appeal need not be by a formal order; it may be shown by the approval of the appeal bond. A citation is not necessary when an appeal is taken during the term of court at which the order appealed from is entered. Brandies v. Cochrane, 105 U. S. 262, 26 L. Ed. 989; Sage v. Railroad Co., 96 U. S. 712, 24 L. Ed. 641; Draper v. Davis, 102 U. S. 370, 26 L. Ed. 121; Trust Co. v. Stockton, 18 C. C. A. 408, 72 Fed. 1.

The motion is overruled.

(107 Fed. 639.)

EARLE v. CARSON.

(Circuit Court of Appeals, Third Circuit. March 12, 1901.)

No. 29.

NATIONAL BANKS—STOCKHOLDERS SUBJECT TO ASSESSMENTS — TRANSFER OF SHARES IN GOOD FAITH.

An owner of shares in a national bank, who sold the same in good faith, without knowledge or reason to believe that the bank was insolvent, and who did everything that was reasonably possible to have the proper formal transfer made on the books of the bank, cannot be treated as a

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shareholder, and held liable to an assessment made by the comptroller upon the subsequent closing of the bank as insolvent, upon evidence showing that the bank was in fact insolvent at the time the sale was made, and that the purchaser was also insolvent. The statute imposes no restriction upon the right to transfer shares because of the insolvency of the bank or the transferee, nor do considerations of public policy justify it where the seller has exercised due diligence, and has acted in the transaction with fairness and good faith.[1]

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Charles Biddle and Asa W. Waters, for plaintiff in error.
Richard C. Dale, for defendant in error.

Before GRAY, Circuit Judge, and McPHERSON and BRADFORD, District Judges.

J. B. McPHERSON, District Judge. This suit is brought by the receiver of an insolvent national bank to enforce the double liability of a shareholder. The bank was closed and the receiver was appointed on December 23, 1897, and upon that day the name of the defendant appeared upon the official list of shareholders as the owner of 10 shares of the capital stock. Prima facie, therefore, she was liable for the assessment that was afterwards levied by the comptroller of the currency; but she met this apparent liability (successfully, as the verdict shows) by offering evidence at the trial to prove that on December 2d she had sold her shares in good faith, without knowledge or suspicion that the bank was either then insolvent, or was likely to prove insolvent, and that she had done everything that was reasonably possible to procure a transfer of the shares on the books of the bank to the purchaser. Under several decisions of the federal courts, if the evidence established these facts, a complete defense was presented to the receiver's claim. Whitney v. Butler, 118 U. S. 655, 7 Sup. Ct. 61, 30 L. Ed. 266; Richmond v. Irons, 121 U. S. 27, 7 Sup. Ct. 788, 30 L. Ed. 864; Earle v. Coyle, 38 C. C. A. 226, 97 Fed. 410; Matteson v. Dent, 176 U. S. 521, 20 Sup. Ct. 419, 44 L. Ed. 571. Recognizing the probability that the defense would be successful, the receiver attempted to reply to it by offering to prove in rebuttal that the bank was insolvent on December 2d as well as on December 23d, and that the purchaser of the shares was also insolvent at the time the sale was made to him. This evidence was objected to as immaterial, unless the receiver should offer to follow it by proof that the defendant had knowledge of the insolvency of the bank and of the insolvency of the purchaser; and, as the receiver was unable thus to follow the offer, the learned judge excluded the testimony. It should be noted that neither in the court below nor in this court was it contended that the evidence was offered upon the question of the defendant's good faith. Her ignorance of the insolvency and her good faith were conceded, and the receiver's purpose was merely to raise the question that is immediately to be stated and

[1] Who liable as shareholder in national banks, see note to Beal v. Bank, 15 C. C. A. 130, and supplemental note at end of case.

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considered. Manifestly, if the evidence had been offered to affect the defendant's good faith, it would have been insufficient, without other evidence from which her knowledge of the bank's insolvency might fairly be inferred.

It is the exclusion of this rebuttal testimony that is complained of under the only assignments of error that need be discussed. The question presented is this: In what sense does the double liability of a shareholder in a national bank become fixed when the bank becomes insolvent in fact? Is it either fixed absolutely, so that no transfer, in good faith or otherwise, to any purchaser whatever, can afterwards be made that will relieve the shareholder? Or is it so far fixed that no valid transfer can be made, even in good faith, if the purchaser be insolvent? The plaintiff in error has referred us to cases decided in several states under their respective constitutions and statutes that seem to support his contention concerning the nature and time of maturity of a shareholder's liability. These decisions hold that the liability is fixed, either absolutely or sub modo, by the fact of insolvency; but we do not discuss them, because the national banking act and the decisions of the supreme court of the United States have established a different rule in respect to shares in a national banking association. Section 5139, Rev. St., provides that such shares shall be transferred on the books of the bank as the by-laws may prescribe, and that "every person becoming a shareholder by such transfer shall in proportion to his shares succeed to all the rights and liabilities of the prior holder of such shares." This provision has been so enlarged by the decisions already cited that a shareholder is enabled to rid himself of his rights and liabilities by less than a transfer in fact. He will satisfy this section if he is able to prove that he sold in good faith, and that he did everything that was reasonably possible to procure the proper formal transfer on the books of the association. There is no restriction in the banking act forbidding transfer after the bank has become insolvent, or forbidding transfer to an insolvent person at any time; and, if these restrictions on the right to sell are to be enforced, it is because they are imposed by the courts in obedience to considerations of public policy, or in accordance with the general principles of justice and fair dealing that are applied to test any given transaction, although no statute may have enacted these principles as rules of decision.

What answer, then, do the principles of justice and fair dealing lead us to give to the question now before the court? We think the answer should be this: As congress has imposed no restriction on the right to sell, and as the duty to transfer has been held to be fulfilled by a proper, even if an unsuccessful, effort to transfer, the seller is bound simply to diligence, fairness, and good faith in the transaction. He is not bound at his peril to know that the bank is insolvent, or that the proposed purchaser of his shares is insolvent. He is bound to take notice of any fact that may reasonably put him on inquiry concerning the insolvency of the bank or of the purchaser, and to use diligently the means of knowledge at his disposal. If he knows, or has reasonable ground to believe,

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that the bank is insolvent, it would be a fraud if, with intent to evade his own liability, he should sell his shares, even to a solvent person; and both the receiver of the bank and the purchaser would find a court of equity ready to afford them proper redress. So, also, if with similar knowledge of the bank's insolvency, or with reasonable ground for belief, a shareholder should sell to a person whom he knew to be insolvent, this would be presumably misconduct of the same nature. Such a sale could rarely withstand attack by, or on behalf of, the persons injured; for the apparent inference of intent to evade the statutory liability would almost inevitably be drawn. But why should the unknown fact that the bank is insolvent destroy the statutory right of transfer, if the transfer is made in good faith? In our opinion, no principle of justice or fair dealing forbids such transfer, for by the very assumption the transfer is bona fide, and in ignorance of the bank's insolvency; and the seller is therefore seeking no unfair personal advantage, but is merely exercising innocently an apparent statutory right.

Neither, as we think, is the transfer under such circumstances forbidden by public policy. In the case of a transfer to a solvent purchaser, no consideration for the creditors of the bank demands that the sale be forbidden; for between two solvent persons it is of no importance to the creditors upon which person the assessment may be levied. If the transfer be made to an insolvent person, then, although the transaction may be in good faith, no doubt the creditors of the bank are injured; but, if it is sought to prevent the possibility of doing such an injury by a ruling that such transfers are invalid,—and such a ruling must rest upon the ground of public policy, and not upon the ground that the ignorant and innocent shareholder has violated any principle of justice or fair dealing,—we think it would be very difficult to apply the rule of policy consistently. The reason for such a decision could only be that, as the bank's creditors have, by the mere fact of the bank's insolvency, become entitled to enforce the double liability, a shareholder ought not to be allowed, even by an act done ignorantly and in good faith, to render a part of the creditors' security unavailable by a transfer to an insolvent person. We see no other ground on which the ruling could be sustained, and this ground seems to us unsatisfactory for the following reasons: First. The reason being that harm to the creditors should be prevented, an irresponsible shareholder ought to be permitted to transfer to another irresponsible person; for, in that event, the creditors would suffer no harm, and no reason would exist for restricting the statutory right to sell at will. Second. The reason, if sufficient, ought logically to be extended so as to strike down transfers to insolvent persons made while the bank was solvent, as well as to be applied to transfers made after it had become insolvent; for the same harm is done to creditors in the one case as in the other, and in both cases a withdrawal of the statutory security ought, upon the assumption, to be prevented. Third. The rule would, or at least might, involve inquiry into the solvency of three persons,—the seller, the pur-

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chaser, and the bank; and the inconvenience of such an inquiry in each of many possible suits is entitled to weight in determining the applicability of the rule. Fourth. In every litigated case the question of the bank's solvency, at least at a particular date before its doors were closed, would be in issue; and, as this question is one of fact for the determination of a jury, it is readily conceivable that, either because the amount of evidence was not the same in every case, or because different juries were disposed to take different views of the same facts, there would be conflicting verdicts concerning the bank's solvency at substantially the same instant of time. Fifth. To apply such a rule would, in the language of defendant's counsel, "introduce into all transactions an element of uncertainty; for every transaction would be subject to review, even though made in good faith, if it subsequently proved that at the date when the transfer was made the bank, if then liquidated, would have proved insolvent, and that the transferee, if called upon to pay at that day all his debts, would have been unable to respond."

To our minds, these are reasons enough for hesitating to adopt the rule that has been urged upon us. It has no authority to support it, if we except a dictum in Stuart v. Hayden, 169 U. S. 1, 18 Sup. Ct. 274, 42 L. Ed. 639. In that case the principal point decided was that a fraudulent transfer of shares, made after the seller knew of the bank's insolvency, and made also for the very purpose of evading the statutory liability, was invalid against the creditors of the bank; and that the receiver could pursue the seller as if the attempted sale had not been made. The learned justice who delivered the opinion of the court, after discussing and deciding this point, went on to say:

"If the bank be solvent at the time of the transfer,—that is, able to meet its existing contracts, debts, and engagements,—the motive with which the transfer is made is, of course, immaterial. But, if the bank be insolvent, the receiver may, at least, without suing the transferee and litigating the question of his liability, look to those stockholders who, knowing or having reason to know at the time that the bank was insolvent, got rid of their stock in order to escape the individual liability to which the statute subjected them. Whether—the bank being in fact insolvent—the transferror is liable to be treated as a shareholder in respect to its existing contracts, debts, and engagements, if he believed in good faith at the time of transfer that the bank was solvent, is a question which, in the view we take of the present case, need not be discussed; *although he may be so treated, even when acting in good faith, if the transfer is to one who is financially irresponsible.*"

It is upon the italicized clause of this quotation that the plaintiff in error relies; but we think the clause is so obviously a remark by the way that it cannot possibly be taken as a serious decision of a point which in the same breath the learned justice says "need not be discussed." It may also be true that the language is to be understood in the sense suggested by the brief of defendant's counsel. The suggestion is, in substance, this: The clause merely means that the seller may be treated as still a shareholder, if the transfer is to a person who is financially irresponsible; that is to say, from such a transfer the inference may be drawn, having due regard to the facts of the particular case, that the transaction was intended to be evasive, and in that event the seller will continue to

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be a shareholder even if he made a transfer out and out, with no secret arrangement that he was at some future time, or in some future contingency, to have the stock again, or to enjoy its profits, —in other words, even if he made such a transfer as the English cases speak of as a transfer in good faith, the good faith consisting in the fact that the transfer is absolute, and without reservation. Whether this suggestion be correct, we have no means of knowing. The language of the court, however, is certainly a dictum; and if it means what the plaintiff in error declares it to mean, with great respect we must decline to follow it.

There is no need to discuss the assignments of error in detail. They present nothing that calls for further attention.

The judgment of the circuit court is affirmed.

NOTE.

Who are Liable as Shareholders in National Banks.

1. Sufficiency of Subscription.

[a] (U. S. C. C. A., Kan., 1895) Plaintiffs subscribed for certain shares in a bank to increase the capital, and, after paying installments thereon, consented that the bank be consolidated with a national bank, and that the capital of the latter be increased, and that their subscriptions should stand as subscriptions to the increased capital of the national bank, and paid installments on their subscriptions. Some preliminary steps were taken by the national bank to increase its stock, but the comptroller of the currency refused to consent to the full increase, and before the amount of increase allowed by him was paid in, and a certificate therefor issued by him, the national bank was placed in the hands of a receiver. *Held*, that plaintiffs never became stockholders in the national bank.—McFarlin v. Bank, 68 Fed. 868, 16 C. C. A. 46.

2. Trustees.

[a] (U. S. C. C. A., Minn., 1895) One who purchases stock in a national bank with his own money on the suggestion of another person that the latter would buy such stock as the former "could get hold of," without being under any obligation to convey the stock to the other, is not a trustee within the meaning of Rev. St. § 5152, exempting a person holding stock as a trustee from personal liability as a stockholder.—Horton v. Mercer, 71 Fed. 153, 18 C. C. A. 18.

[b] (U. S. C. C., N. Y., 1898) A trustee, though not appointed by a will or an order of a court or judge, is not personally liable for assessments against stock of an insolvent national bank owned by this cestui que trust, but standing in his name, where he has been guilty of no fraud, concealment, or negligence.—Lucas v. Coe, 86 Fed. 972.

[c] (Md. App. 1897) A person appearing on the books of a national bank to be absolute owner of stock is subject to stockholders' liability, though holding it as trustee.—Kerr v. Urie, 37 Atl. 739, 86 Md. 72, 38 L. R. A. 119, 63 Am. St. Rep. 493.

3. Pledgees.

[a] (U. S. Sup., Cal., 1897) One who appears on the official list of the names and residences of the shareholders of a national bank only as "pledgee" of a given number of shares of the capital stock of such bank, nothing else appearing, is not a shareholder, within the meaning of Rev. St. § 5151, and is not subject to the liability imposed by that section upon shareholders of national banks.—Pauly v. Trust Co., 17 Sup. Ct. 465, 165 U. S. 606, 41 L. Ed. 844; affirming (C. C. A. 1893) 7 C. C. A. 422, 58 Fed. 666.

[b] (U. S. C. C. A., Ill., 1900) A pledgee of stock of a national bank, with a power of attorney to have the shares transferred on the books, so long as he holds the shares as security, without intending to assume liability as a

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stockholder, cannot be treated as one, and subjected to an assessment, under Rev. St. § 5151, on the insolvency of the bank, although he has caused the shares to be transferred to a third person under an agreement that they are still to be held as security for the debt.—Wilson v. Trust Co., 98 Fed. 688, 39 C. C. A. 231.

[c] (U. S. C. C. A., N. Y., 1897) A corporation which receives shares of national bank stock in pledge, with power to use and sell, and which, in good faith, without suspicion of the bank's insolvency, causes new certificates to be issued in the name of one of its employés, merely because it is unwilling they should stand in the name of the original owners, remains a mere pledgee, and is not liable, as a shareholder, to assessment on the stock.—Bank v. Harmon, 79 Fed. 891, 25 C. C. A. 214.

[d] (U. S. C. C. A., Pa., 1901) A pledgee of shares of stock in a national bank as collateral security for a debt due him from the owner, with power of attorney to transfer the same on the books of the bank, does not become a stockholder, and liable to an assessment as such on the failure of the bank, contrary to his intention, by causing the stock to be transferred into the name of an employé, who holds it for the benefit of all parties interested, nor by any other action which is required or is proper for the protection of both his own interests and those of the pledgor, and not inconsistent with his retention of the stock merely as pledgee, such as paying an assessment required by the comptroller to make good the impaired capital of the bank, and charging the amount to the pledgor.—Higgins v. Safe-Deposit Co., 46 C. C. A. 509, 108 Fed. 475.

[e] (U. S. C. C., Pa., 1900) A pledgee of shares of stock in a national bank, with a power of attorney in blank to transfer the same indorsed thereon and signed by the pledgor, does not become liable as owner for an assessment thereon by causing them to be transferred on the books of the bank to a third person for the purpose of being held by him as trustee for both parties, and in accordance with the contract of pledge, although the pledgor did not expressly authorize such transfer.—Hayes v. Safe-Deposit Co., 105 Fed. 160.

4. Married Women.

[a] (Md. App. 1897) Where one residing in Maryland subscribes for stock of a national bank of another state, and then transfers it to his wife, also a resident of Maryland, she becomes owner thereof, and is subject to stockholders' liability, under Rev. St. U. S. § 5152, without regard to the laws of the other state relative to contract by married women.—Kerr v. Urie, 37 Atl. 789, 86 Md. 72, 38 L. R. A. 119, 63 Am. St. Rep. 493.

5. Personal Representatives.

[a] (U. S. C. C. A., Mass., 1895) An executor who receives certificates of national bank stock as part of the assets of decedent's estate, and includes them in his inventory returned to the probate court, is a shareholder, and liable as such for an assessment, under Rev. St. § 5151, subject to the relief granted by section 5152.—Parker v. Robinson, 71 Fed. 256, 18 C. C. A. 36.

[b] (U. S. C. C., Pa., 1900) A testator directed by his will that a daughter's share in his estate should remain in the hands of his executors, and be invested by them, and the income paid to the daughter during her life, and at her death the part of the estate so "held in reserve" by the executors should revert to the general estate. The executors set apart as a portion of the daughter's share certain shares of stock in a national bank held by the testator, and caused the same to be transferred on the books of the bank to themselves as "trustee." *Held*, that the legal title to such shares devolved upon them as executors, and they had no power to devest themselves of such title by any transfer, and that an action to recover an assessment on the stock was properly brought against them as executors, and especially where the assessment was not made until after the daughter's death.—Earle v. Rogers, 105 Fed. 208.

[c] (U. S. C. C., Wash., 1898) The widow of a deceased stockholder of an insolvent national bank, who by authority of the will undertook to settle the estate as executrix without judicial proceedings, but failed to transfer such stock to herself or other person, cannot, on the ground that the estate is fully settled, escape liability as executrix for assessments on such stock to

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the extent of assets of the estate under her control.—Baker v. Beach, 85 Fed. 836.

[d] (U. S. D. C., Vt., 1900) Under Rev. St. § 5152, providing that funds in the hands of an executor shall be liable for assessments on corporate stock to the same extent as the testator would be if living, an executrix is liable as such for assessments made by the comptroller on shares of stock in a national bank held by her, and issued to the estate of her testator in exchange for shares held by the testator in his lifetime, and surrendered by her on a reduction of the capital stock of the bank.—Brown v. Ellis, 103 Fed. 834.

[e] (U. S. D. C., Vt., 1900) In an action by the receiver of an insolvent bank against the executrix of a deceased shareholder to recover assessments on the stock, the certificate of the comptroller of the currency issued to a national bank, approving a reduction of its capital stock, is in itself proof of such reduction.—Brown v. Ellis, 103 Fed. 834.

6. Distributees.

[a] (U. S. Sup., Minn., 1900) Enforcing the whole amount of an assessment on national bank stock, to the extent of the distributive share received, against one of the heirs or next of kin to whom the stock has been allotted by the probate court in indivision, in proportion to their interest in the estate, pursuant to Gen. St. Minn. 1894, § 5918 et seq., does not violate any rights under the federal statutes.—Matteson v. Dent, 20 Sup. Ct. 419, 176 U. S. 521, 44 L. Ed. 571; affirming (1898) 75 N. W. 1041, 73 Minn. 170.

[b] (U. S. Sup., Minn., 1900) The widow and heirs of a shareholder in a national bank, to whom the probate court allots the shares of stock in indivision, in proportion to their interests in the estate, but who let the stock stand in the name of the deceased, without any notice of their title to it, are liable, under Rev. St. U. S. §§ 5139, 5151, 5152, to assessments on the stock in case the bank subsequently becomes insolvent.—Matteson v. Dent, 20 Sup. Ct. 419, 176 U. S. 521, 44 L. Ed. 571; affirming (1898) 75 N. W. 1041, 73 Minn. 170.

[c] (Minn. Sup. 1897) After the estate of a deceased stockholder of a national bank was administered upon, and the assets, including the bank stock, distributed, the bank became insolvent, and a receiver was appointed. The stock was never transferred on the books of the bank to the administrator or distributees. In an action by the receiver under Gen. St. Minn. c. 77, to recover of the distributees, to the extent of assets received by them, the amount of an assessment on stockholders, under Rev. St. U. S. § 5151, *held*, that as the claim was a contingent one, and did not become absolute until the bank had become insolvent, and this was after the time to file claims against the estate had expired, the action can be maintained, notwithstanding Rev. St. U. S. § 5152, providing that "persons holding stock as executors, administrators, guardians, or trustees, shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or persons interested in such trust fund would be, if living."—Dent v. Matteson, 73 N. W. 416, 70 Minn. 519.

7. Bona Fide Transfers.

[a] (U. S. C. C., Ky., 1897) Under Rev. St. U. S. § 5151, making shareholders in a national bank liable for the debts of the association, and section 5139, providing for the transfer of shares, with a provision that the transferee shall "succeed to all the rights and liabilities of the prior stockholders of such shares,"—a transfer of stock, though without consideration and to an irresponsible person, cannot be set aside by the receiver if made in good faith without knowledge of the failing condition of the bank.—Sykes v. Holloway, 81 Fed. 432.

[b] (Tenn. Sup. 1896) Defendant, who was the owner of stock in a national bank, which, under its by-laws, was transferable only on the books of the bank, sold the same, and, after executing a written assignment to the purchaser, and a power of attorney in blank to make the transfer, indorsed on her certificate of stock, delivered the certificate to the president of the bank, who promised to make the proper transfer on its books, but failed to do so,

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though the certificate was thereafter treated and used by the bank as the property of the purchaser. *Held*, that defendant was not liable as a stockholder.—Cox v. Elmendorf, 37 S. W. 387, 97 Tenn. 518.

8. Fraudulent Transfers.

[a] (U. S. Sup., Neb., 1898) A stockholder in a national bank who knows of its existing or impending insolvency cannot escape liability for assessment under Rev. St. § 5151, by transferring the stock with intent to avoid such liability, though the transfer is absolute and to a solvent transferee, able to pay the assessments. Under such circumstances the intent with which the transfer is made is material.—Stuart v. Hayden, 18 Sup. Ct. 274, 169 U. S. 1, 42 L. Ed. 639; Gruetter v. Stuart, Id. Affirming (C. C. A. 1895) 72 Fed. 402, 18 C. C. A. 618.

[b] (U. S. C. C. A., Neb., 1895) A national bank, having a nominal capital of $300,000, made such losses that its assets were worth but $900,000 while its debts aggregated $1,400,000. It had $660,600 of bills receivable, over $300,000 of which were worthless. A director of several years' standing, and the chairman of the finance committee, whose business it was to know the value of the bank's assets and the amount of its liabilities, who had examined the bank's bills receivable two or three months before a transfer of his stock, who knew that the bank had made heavy losses, and who disliked the management of the bank, and knew that there was no prospect of more dividends, that the capital was impaired, and that the bank held $136,000 worth of worthless paper, transferred his stock, at a premium of 20 per cent., and on the same day drew over $10,000 in money on deposit in the bank in his name to pay to the transferee in a trade for a building received, subject to a mortgage of $30,000, only 30 days before the bank failed. *Held*, that a finding that the transfer was made for the purpose of escaping individual liability as stockholder was justified.—Stuart v. Hayden, 72 Fed. 402, 18 C. C. A. 618.

[c] (U. S. C. C. A., Tenn., 1897) To hold liable for an assessment one who has transferred his stock to an irresponsible person, the transferror need not have had actual knowledge of the insolvency of the bank at the time of the transfer, but it is sufficient if he had good ground to apprehend its failure, and made the transfer to relieve himself from liability.—Cox v. Montague, 78 Fed. 845, 24 C. C. A. 364.

[d] (U. S. C. C., Wash., 1898) A stockholder in a national bank, with knowledge that the bank is in a failing condition, cannot make a voluntary transfer of his stock to one financially irresponsible, and thereby escape liability for assessments.—Baker v. Reeves, 85 Fed. 837.

9. Purchase Induced by Fraud.

[a] (U. S. C. C. A., Kan., 1899) The liability of a stockholder of a national bank to assessment on the bank's insolvency is one created by statute, for the sole benefit of creditors; and one who becomes and remains a stockholder for a considerable length of time while the bank is engaged in business, and until it is declared insolvent, cannot avoid such liability on the ground that his subscription was induced by fraud which would entitle him to a rescission as between himself and the corporation, unless it is affirmatively shown that there are no creditors who became such while he was a registered stockholder.—Lantry v. Wallace, 97 Fed. 865, 38 C. C. A. 510.

[b] (U. S. C. C. A., Mo., 1898) A subscription to the stock of a national bank, though induced by false representations of its officers, is not void, but voidable only, at the election of the subscriber; and where he continues for years, and until the bank has been placed in liquidation, to remain and act as a stockholder, and to receive dividends as such, though without knowledge of the fraud, or means of ascertaining it, he cannot then exercise his option to rescind the contract of subscription as against the bank's creditors, whatever his rights might be as against the corporation.—Scott v. Latimer, 33 C. C. A. 1, 89 Fed. 843.

[c] (U. S. C. C., Kan., 1898) Though a person may have been induced by fraudulent representations to purchase stock of a national bank, the contract is voidable only at his option; and, where he has not discovered the fraud nor made his election at the time the bank passes into the hands of a

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receiver, he is apparently a stockholder, and can only escape liability as such by affirmatively alleging and proving the fraud, acts of diligence which negative any charge of negligence, and that no debt was created nor credit given the bank after he became such stockholder.—Wallace v. Hood, 89 Fed. 11.

[d] (U. S. C. C., Or., 1897) One who is induced by fraud to purchase stock of an insolvent national bank, and have it transferred to him on the books of the bank, and who, upon discovery of the fraud, takes prompt action to rescind the contract, is not liable to assessment on such stock, except on behalf of persons who extended credit to the bank, after the transfer, without knowledge of the fraud.—Stufflebeam v. De Lashmutt, 83 Fed. 449.

[e] (U. S. C. C., Or., 1900) Defendant, sued by the receiver of an insolvent national bank for an assessment as a stockholder, was induced to purchase the stock held by him at the time the bank was closed from the president of the bank by the fraudulent representations of the president and cashier. Such fraud had been established in a suit for rescission of the contract, brought by defendant in a state court, to which the receiver was a party. The bank was in fact insolvent when the purchase was made, and was closed by the comptroller within 36 days thereafter. The defendant lived several hundred miles from the place where the bank was located, and took no part in its affairs. *Held*, that an answer setting up such facts as a defense was not demurrable.—Stufflebeam v. De Lashmutt, 101 Fed. 367.

10. Registry of Shares in Name of Agent.

[a] (U. S. C. C. A., Mass., 1899) The real owner of shares of stock in a national bank, which, by his procurement or permission, stand on the books of the bank in the name of an agent, and have never been in his own name, may be charged as a shareholder for an assessment made on the bank's insolvency, and the receiver may bring an action at law for the collection of such assessment directly against him, without regard to the liability of the agent.—Houghton v. Hubbell, 33 C. C. A. 574, 91 Fed. 453.

[b] (U. S. C. C., Mass., 1898) Defendant acquired stock of a national bank through his agents, in whose names the shares were registered on the books of the bank, and so appeared when the bank became insolvent. Defendant had all the time held the certificates, so indorsed that he might have had the shares registered in his own name. *Held*, that the receiver could recover from defendant an assessment on said stock, though he might have proceeded against those in whose names the shares appeared on the bank's stock register.—Hubbell v. Houghton, 86 Fed. 547.

11. Purchase in Name of Minor Child.

[a] (U. S. C. C., Vt., 1896) One buying stock in a national bank in the names of his minor children himself becomes liable to assessment as a shareholder, for minors are incapable of assenting to become stockholders, so as to bind themselves to the liabilities thereof.—Foster v. Chase, 75 Fed. 797.

[b] (U. S. C. C., Vt., 1896) The father's liability is not affected by the fact that after the assessment, but before suit was brought to recover it, the son became of age, and assented to holding the stock.—Foster v. Wilson, 75 Fed. 797.

12. Estoppel to Deny Liability.

[a] (U. S. C. C. A., Kan., 1896) Stock of a bank was purchased by defendants, of the president thereof, at a time when there was no overissue, and when the amount purchased was credited to him on the books. At the time, or shortly afterwards, the stock, by his direction, was transferred from his account to theirs, on the stock journal and stock ledger, and new certificates were issued to them. Thereafter they were treated by the bank as the lawful owners of the stock, and were allowed to vote the same and receive dividends thereon. The bank having failed, suit was brought to collect an assessment made against defendants as shareholders. *Held*, that they were estopped from claiming that they were not stockholders, although the president neglected to cancel the old certificates, and afterwards hypothecated part of them, thereby creating an overissue.—Burt v. Bailey, 73 Fed. 693, 19 C. C. A. 651.

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[b] (U. S. C. C. A., R. I., 1900) It is only in clear cases that a pledgee, on the ground of estoppel, can be subjected to liability for an assessment on national bank stock, instead of the owner, upon whom the legal obligation rests; and, where stock stood upon the books of a bank in the name of a person as cashier of another national bank, the designation suggested a qualified or representative holding, which put all persons on inquiry, and the bank of which the holder was cashier is not estopped to show that it held the stock as collateral only,—at least, in the absence of evidence that the insolvent bank or its creditors in fact acted in reliance on its supposed ownership.—Frater v. Bank, 101 Fed. 391, 42 C. C. A. 133.

[c] (U. S. C. C., Iowa, 1900) In an action by the receiver of a national bank to recover an assessment from the defendant as a stockholder, where it is admitted or proved that defendant is in fact merely a pledgee of the stock, the burden rests upon the plaintiff to show that defendant, by reason of having knowingly permitted the stock to stand in his name as owner upon the books of the bank, is estopped to deny such ownership as against its creditors.—Tourtelot v. Stolteben, 101 Fed. 362.

[d] (U. S. C. C., Minn., 1898) Where one subscribes for part of an increased issue of national bank stock, but actually receives original stock instead, and holds it for several years, receiving dividends and paying assessments thereon, he will be liable, upon failure of the bank, to assessment on such stock by the comptroller of the currency.—Rand v. Bank, 87 Fed. 520.

[e] (U. S. C. C., Mo., 1896) Where the capital of a national bank has been increased, and defendants have received their additional stock, and for several years held themselves out as stockholders, they cannot deny their liability upon the ground that the increase of capital was fraudulent, and that they could not have discovered the fraud with ordinary care.—Latimer v. Bard, 76 Fed. 536.

[f] (U. S. C. C., Neb., 1896) One who knowingly permits his name to be entered upon the stock books of a national bank as the owner, individually, of stock therein, cannot be permitted, as against creditors, or a receiver of the bank representing them, to show that he was not the owner of the stock; and he is liable for an assessment thereon, though he held the stock, in fact, as trustee for the bank itself.—Lewis v. Switz, 74 Fed. 381.

[g] (U. S. C. C., R. I., 1898) In an action to recover an assessment on national bank stock carried on its books in the name of an individual described as cashier of a certain other bank, neither the latter bank nor the individual is estopped from setting up that they hold the stock merely as pledgees.—Baker v. Bank, 86 Fed. 1006.

[h] (U. S. C. C., R. I., 1898) A pledgee of national bank stock is not liable as a stockholder for assessments, except by estoppel.—Baker v. Bank, 86 Fed. 1006.

13. Joint Liability of Transferror and Transferee.

[a] (U. S. C. C., Vt., 1896) One C. was the holder of stock in the D. National Bank, and was also an officer of the L. Bank, which held stock in the D. Bank. In the latter capacity, he was informed of an urgent demand upon the L. Bank to send $5,000 by telegraph in aid of the D. Bank. Within a week after this demand, L. transferred his stock in the D. Bank, without consideration, to his five children, one of whom was a married woman and two were minors. Within five months thereafter, the D. Bank failed, and an assessment was made on the stockholders. *Held*, that the transfer must have been made by L. in contemplation of the liability, and that both he and his transferees were liable for the assessment, the latter because the liability was cast upon them by law when they became stockholders.—Foster v. Lincoln, 74 Fed. 382.

[b] (U. S. C. C., Wash., 1898) The owner by assignment of stock in a national bank at the time of its failure is liable for assessments thereon, though his assignor, who transferred it knowing that the bank was in a failing condition, is also liable.—Baker v. Reeves, 85 Fed. 837.

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(108 Fed. 475.)

HIGGINS v. FIDELITY INS., TRUST & SAFE-DEPOSIT CO.

(Circuit Court of Appeals, Third Circuit. April 29, 1901.)

No. 10.

NATIONAL BANKS—STOCKHOLDERS SUBJECT TO ASSESSMENT—PLEDGEE.

A pledgee of shares of stock in a national bank as collateral security for a debt due him from the owner, with power of attorney to transfer the same on the books of the bank, does not become a stockholder, and liable to an assessment as such on the failure of the bank, contrary to his intention, by causing the stock to be transferred into the name of an employé, who holds it for the benefit of all parties interested, nor by any other action which is required or is proper for the protection of both his own interests and those of the pledgor, and not inconsistent with his retention of the stock merely as pledgee, such as paying an assessment required by the comptroller to make good the impaired capital of the bank, and charging the amount to the pledgor.[1]

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

John G. Johnson and Asa W. Waters, for plaintiff in error.
Richard C. Dale, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. This was an action brought by George H. Higgins, receiver of the Keystone National Bank of Erie, an insolvent national banking association, against the Fidelity Insurance, Trust & Safe-Deposit Company, to recover the amount of an assessment on stockholders of the bank, made under section 5151 of the Revised Statutes, upon the allegation that the defendant was a shareholder of the bank at the time of its failure, and thus liable to creditors for the assessment sued for. It appears that on November 15, 1890, the defendant company made a loan of $15,000 to the firm of Delamater & Co. (in renewal of prior loans), for which Delamater & Co. gave to the defendant their note for $15,000, dated November 15, 1890, payable in 60 days, and as collateral security for the payment of this note deposited with the defendant 230 shares of the capital stock of the Keystone National Bank of Erie, each share being of the par value of $100; 130 shares thereof standing in the name of George B. Delamater, and 100 shares thereof standing in the name of George W. Delamater. With the certificates of the stock thus deposited, blank powers of attorney to assign and transfer the same, signed by George B. Delamater and George W. Delamater, respectively, were delivered to the defendant. On December 5, 1890, the firm of Delamater & Co. made a general assignment for the benefit of creditors. On January 10, 1891, the defendant sent to the Keystone National Bank of Erie the original certificates so deposited as collateral, with direction to the bank to transfer the same into the name of W. W. Hand, who was a clerk in the employ of the de-

[1] Rights and liabilities of pledgees of corporate stock, see note to Frater v. Bank, 42 C. C. A. 135.

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fendant. This transfer was made on the books of the bank, and new certificates were issued in the name of W. W. Hand, dated January 15, 1891, and were transmitted by the bank to the defendant. Hand signed a transfer in blank on the back of each of the new certificates, and in that form they were retained by the defendant. On March 16, 1892, the comptroller of the currency, finding that the capital of the bank was impaired, ordered an assessment of 25 per centum on the capital of the bank to make good the deficiency. The defendant paid this assessment, namely, $5,750, on the above-named 230 shares of stock, and charged the same to Delamater & Co. as an additional advance. On December 22, 1892, pursuant to section 5143 of the Revised Statutes of the United States, with the approval of the comptroller of the currency, the capital stock of the bank was reduced from $250,000 to $150,000, divided into 1,500 shares of $100 each. On January 24, 1893, the defendant sent to the bank the certificates which had been issued to W. W. Hand for the 230 shares, and on February 7, 1893, the defendant received from the bank a certificate in the name of W. W. Hand for 172½ shares, being the reduced number. Hand signed a transfer in blank on the back of the new certificate, and in that form it remained in the defendants' possession. On one or more occasions Hand gave a proxy to vote at the annual meeting of stockholders, and he also gave a proxy to vote at the special meeting of the stockholders in favor of the reduction of the capital stock. On June 20, 1897, the Keystone National Bank of Erie closed its doors, and on July 26, 1897, the comptroller of the currency appointed a receiver of the bank. On November 3, 1897, the comptroller ordered an assessment of 100 per centum on the stockholders. The court submitted to the jury the question of fact whether or not the defendant had changed its relation to the stock from that of pledgee to that of owner. The question so submitted was thus stated by the learned trial judge in his charge:

"The question is whether, before this Keystone National Bank failed, the defendant company, the Fidelity Trust Company, of this city, was the real owner of these shares of stock, or whether it continued to be the pledgee of the stock,—whether the stock had become theirs in the sense in which we use in ordinary speech the word 'owner,' or whether it had been continued to be pledged to them as collateral security for the payment of the note which has been offered in evidence."

Again, the learned trial judge said to the jury:

"The whole subject, as I regard it,—for the present, at least,—is a question of fact; and that question I repeat is whether the defendant company, the Fidelity Trust Company, was, at the time when this bank went into the hands of the receiver, the real owner of these shares of stock, or whether it continued to hold them as collateral security for the payment of the note originally given by the Delamaters."

The verdict of the jury was in favor of the defendant, and subsequently the court entered judgment for the defendant on the verdict.

Undoubtedly, this stock originally was pledged by the owners, the Delamaters, to the defendant company, as collateral security. Wrongful conversion by the defendant is negatived by the verdict. Upon the finding of the jury it must be accepted as established that

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the defendant did not intentionally change its relation to the stock. This, we think, is very clear under the uncontradicted evidence. Did the defendant do anything whereby, contrary to its intention, it became the absolute owner of the stock? The payment of the pro rata share of the assessment ordered by the comptroller of the currency to make good the impairment of the capital stock of the bank was for the protection and benefit of all interested in the pledged stock, and was entirely consistent with the preservation of the pledge. The assent to the reduction of the capital stock of the bank, made agreeably to the statute, under the approval of the comptroller of the currency, did not work any prejudice whatever to the pledgors or their assignees, and we do not see how it could change the relation of the defendant to the stock. It is said, however, that the defendant had no right to transfer the stock to W. W. Hand without the express consent of the Delamaters or their assignees. But we agree with the views expressed by the circuit court that the delivery by the Delamaters of the certificates with the blank powers to assign and transfer them implied their consent to such a transfer of the stock as might be deemed reasonably necessary for the protection of the defendant. The transfer to Hand was not in hostility to the pledge, but subservient to it. He held the legal title for the benefit of all interested in the stock,—the pledgee first, and then the pledgors and their assignees. Moreover, neither the pledgors nor their assignees are complaining. They are not parties here. This suit is by the receiver of the bank against the defendant company to subject it to the personal liability imposed upon shareholders by section 5151 of the Revised Statutes of the United States. Does this record disclose, as against the defendant, any ground for such liability? The court below answered the question negatively, and, we think, rightly. This conclusion accords with the decisions of the supreme court of the United States in Anderson v. Warehouse Co., 111 U. S. 479, 4 Sup. Ct. 525, 28 L. Ed. 478, and in Pauly v. Trust Co., 165 U. S. 606, 619, 17 Sup. Ct. 465, 41 L. Ed. 844. The stock in the Keystone National Bank of Erie owned by the Delamaters, and by them pledged to the Fidelity Insurance, Trust & Safe-Deposit Company, never stood on the registry or books of the bank in the name of the company, and in fact the company was mere pledgee. In Anderson v. Warehouse Co., supra, Chief Justice Waite said:

"It is also undoubtedly true that the beneficial owner of stock registered in the name of an irresponsible person may, under some circumstances, be liable to creditors as the real shareholder; but it has never, to our knowledge, been held that a mere pledgee of stock is chargeable where he is not registered as owner."

And it was there ruled that a pledgee of national bank stock, who was unwilling to assume the liability of a registered shareholder, acting in good faith, and with no fraudulent intent, might lawfully cause the pledged stock to be transferred to and registered in the name of an irresponsible employé for the purpose of perfecting the security of the pledgee without incurring a shareholder's liability. Here the defendant company acted in perfect good faith. At the time of the transfer to Hand, the Keystone National Bank of Erie was in

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good credit. Moreover, the defendant was under no personal liability, for it was not registered as owner. The facts of the defendant's case, we think, bring it clearly within the principle laid down in Pauly v. Trust Co., supra, namely, that, if one receives shares of the stock of a national banking association as collateral security to him for a debt due from the owner, with power of attorney authorizing him to transfer the same on the books of the association, and, being unwilling to incur the responsibilities of a shareholder as prescribed by the statute, causes the shares to be transferred on such books to another under an agreement that they are to be held as security for the debt due from the real owner to his creditor, the latter acting in good faith, and for the purpose only of securing the payment of that debt without incurring responsibility of a shareholder, he (the creditor) will not, although the real owner may, be treated as a shareholder, within the meaning of section 5151. We are not able to see that any one of the numerous assignments of error is well founded. Upon the whole case we are of opinion that judgment in favor of the defendant was rightly entered. The judgment of the circuit court is affirmed.

(107 Fed. 619.)

WALKER et al. v. HOUGHTELING.

(Circuit Court of Appeals, Seventh Circuit. April 9, 1901.)

No. 696.

1. HUSBAND AND WIFE—WRITTEN LEASE—USE AND OCCUPATION—FAMILY EXPENSES—RIGHT OF ACTION—MAINTENANCE.

   Rev. St. Ill. c. 68, § 15, provides that the expenses of the family shall be chargeable on the property of both husband and wife, or either of them, in favor of creditors therefor, and in relation thereto they may be sued jointly or separately. A house was rented to defendant under a written lease signed by defendant, and the premises were occupied as a dwelling by defendant and wife. *Held*, that the contention that an action could be maintained only on the lease, and against defendant alone, because the instrument was in writing and signed by defendant, and not as an action for use and occupation, under the statute, against defendant and wife, cannot be sustained, since the statutory action was not merely remedial, but created a liability against the husband and wife, independent of any relation of landlord and tenant.

2. SAME—EVIDENCE—ADMISSIBILITY.

   The written lease of the premises was admissible, in an action under the statute against the husband and wife for use and occupation of the premises, to show the value of the use and occupation.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

See 100 Fed. 253; 44 C. C. A. 18, 104 Fed. 513.

The suit in the Circuit Court was by defendant in error against plaintiffs in error to recover for the use and occupation of a certain dwelling house in the City of Chicago, from the first of March 1896, to the thirtieth of April 1898.

The count was framed upon section 15, c. 68, of the Illinois Revised Statutes relating to liability for family expenses.

The defense was the general issue, and a jury having been waived, the case was tried to the court, resulting in a finding and judgment for the

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defendant in error for the sum of one thousand eight hundred and seventy-five dollars, being at the rate of seventy-five dollars per month for the period named.

It was admitted on the trial that during the period named in the declaration the defendant in error was the owner of the premises, and that the house was occupied as a dwelling by the plaintiffs in error—husband and wife.

As tending to show the value of the use and occupation, the defendant in error submitted evidence tending to show that on May first, 1895, a lease was executed by W. D. Houghteling, husband of the defendant in error, now deceased, to plaintiff in error, James H. Walker, to run for a period of two years, at a rental of one hundred dollars per month. It was admitted that no rentals were paid after March first 1896.

At the conclusion of the evidence plaintiff in error, Emeline Tate Walker, moved to strike out all the evidence in regard to the lease, on the ground that it was incompetent, immaterial and irrelevant, which motion was denied by the court, and exceptions duly noted.

Thereupon the plaintiffs in error submitted to the court the following propositions of law, and asked that they be adopted by the court:

1. "Admitting the validity of the lease of the premises No. 345 Dearborn Ave., covering a part of the period for which it is sought to recover rent for said premises, the court holds that the plaintiff cannot recover thereon in her own name in assumpsit as a beneficiary thereunder if not named therein."

2. "It would not be proper under the Revised Statutes of Illinois (chapter 68, § 15) to enter a joint judgment against Husband and Wife where the expense which it is sought to recover was evidenced by a contract or lease signed by the Husband alone."

3. "Admitting the validity of the lease of the premises No. 345 Dearborn Avenue, Chicago, signed by the defendant, James H. Walker, covering a part of the period for which it is sought to recover rent the plaintiff may not disregard such lease and recover against the defendants jointly in the action for use and occupation."

The record shows that these propositions were marked "refused by the court"; to which ruling there was objection and exception.

The assignment of errors is, in substance: First, that the admission of evidence respecting the lease was incompetent; and secondly, that the instructions offered were erroneously refused.

O. K. Hutchinson, for plaintiff in error.

John M. Harlan, for defendant in error.

Before WOODS, JENKINS, and GROSSCUP, Circuit Judges.

After the foregoing statement of the case, GROSSCUP, Circuit Judge, delivered the opinion of the court, as follows:

Section 15, c. 68, Rev. St. Ill., is as follows:

"The expenses of the family and of the education of the children shall be chargeable upon the property of both husband and wife, or of either of them, in favor of creditors therefor, and in relation thereto they may be sued jointly or separately."

The section was adopted from a similar statute of the State of Iowa (section 2214, McClain's Code, 1882), and has been interpreted by the Supreme Court of Illinois—following, in that respect, the Supreme Court of Iowa—as creating a primary right against husband and wife, or both, for family expenses incurred by either. Myers v. Field, 146 Ill. 50, 34 N. E. 424.

It has been held, also,—in the Appellate Court of Illinois—that the use and occupation of a house for a family dwelling is a legitimate family expense, and falls within the meaning of that term, as it is employed in the statute. Illingworth v. Burley, 33 Ill. App.

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394; Barnett v. Marks, 71 Ill. App. 673; and in this construction of the statute we concur.

The argument of the plaintiffs in error, in substance, is that, because there was a written lease, executed by the husband alone, covering the period for which the suit was brought, and because an action for use and occupation, at common law, will not lie where there is such a lease, it follows that an action for use and occupation, under the family expense statute, in cases where a lease is found to be in existence, will not lie. The insistence is that the suit ought to have been brought by the lessor (the husband of the defendant in error) against plaintiff in error, James H. Walker, the lessee; and only upon the lease.

The fault of this argument is in the assumption that a suit for use and occupation, under the family expense statute, is identical with a suit for use and occupation, at common law; and that both are, on that account, subject to the same conditions. But this is not true. The right of action, at common law, did not create a liability. It proceeded upon the pre-existing relation of landlord and tenant, and in the absence of such relation, was not maintainable. It was intended, as modified, from time to time, by statute, to provide an easy remedy in cases where, without a written lease, there was an actual occupation; leaving other more complicated cases—such as arise at times upon leases—to their appropriate and ordinary remedy.

The family expense statute under consideration, on the contrary, is not simply remedial. It creates a right in favor of the creditor, and a liability against the husband and wife. It introduces into the law a new character of obligation. It is, in no sense, an additional method of enforcing the relation of landlord and tenant, which was the sole purpose of the common law action for use and occupation.

The existence of the lease, in an action like this, is, of course, a material fact. It tends to show the value of the use and occupation. It may, by virtue of its force as a contract, set a limitation upon the amount that can be recovered. But it is not the basis of the suit. The suit is founded upon the provision of the statute that the wife, as well as the husband, shall be liable for family expenses; and upon the fact that the use of a dwelling house is, within the meaning of this statute, a family expense. The circumstance that the subject-matter is the use and occupation of real estate is an incident only; the determinative fact is that, like flour and groceries, this use was for family purposes. With this clearly in mind, the errors assigned are seen to be based upon an erroneous conception of the nature of the suit.

The judgment of the Circuit Court is, accordingly, affirmed.

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(107 Fed. 626.)

LOVELESS v. RANSOM et al.

(Circuit Court of Appeals, Seventh Circuit. January 19, 1901.)

No. 639.

1. APPEAL—JOINT DEFENDANTS—NECESSITY OF SUMMONS AND SEVERANCE.
Where the judgment or decree is joint, all the parties against whom it is rendered must join in the writ of error or appeal, unless there be summons and severance, or the equivalent.

2. SAME—TIME OF MAKING OBJECTIONS.
This matter is jurisdictional, and objection may be made at any time before final disposition of the appeal.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

This is an action of debt on a bond conditioned for the performance of the covenants of a lease, which bond was executed by Carlton H. Gary and Braman H. Loveless as principals, and Noah E. Gary and Braman Loveless as sureties. Noah E. Gary having departed this life, the suit upon the bond is against the two principals, the surety, Braman Loveless, and Caroline H. Gary, Ella Ethel C. Gary, Anna Louise Gary, Dora Bernice Gary, and Ava Grace Gary, respectively the widow and heirs at law of Noah E. Gary. The two defendants Loveless pleaded to the declaration. The other defendants defaulted. The trial resulted in a judgment March 4, 1899, against all the defendants to the action. The judgment concludes with this clause: "Bond on writ of error is fixed at the sum of $4,500. Bill of exceptions to be filed in sixty days." The bill of exceptions, signed May 15, 1899, concludes as follows: "To which decision of the court [referring to the judgment] defendants then and there excepted, and said Braman Loveless prayed an appeal, and prays that this, his bill of exceptions, may be signed and made a part of the record in this cause, which is done accordingly." Prior thereto, and on March 16, 1899, Braman Loveless filed in the clerk's office a bond, with sureties, reciting, among other things, that, he "being about to obtain a writ of error," the bond was conditioned "that if the said Braman Loveless shall prosecute his appeal to effect, and answer all damages and costs if he fails to make his plea good, the above obligation to be void; else to remain in full force and virtue." The record does not show this bond to have been approved by the court, except as it was approved by a subsequent order of September 2, 1899, allowing a writ of error. At a subsequent term of the court, on September 2, 1899, Braman Loveless filed his petition for a writ of error, with an assignment of errors, and the court on that day allowed the writ; the order reciting, "Said defendant having given bond according to law in the sum of forty-five hundred dollars, which said bond is to operate as a supersedeas." A citation was thereupon on that day issued, returnable within 30 days from its date, and was served September 30th following. The record was filed in this court October 25, 1899. On January 16, 1900, the defendants in error filed their brief upon the merits of the appeal, and on January 19, 1900, filed their motion to dismiss the writ of error upon the ground that no summons and severance had been had, and that this court had not jurisdiction of a writ of error sued out by one of the defendants to the judgment.

Charles Larimore and J. W. Cochran, for plaintiff in error.

Lockwood Honore, for defendants in error.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

JENKINS, Circuit Judge, after the foregoing statement of the case, delivered the opinion of the court.

The rule is firmly established that, where a judgment or decree

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is joint, all the parties against whom it is rendered must join in the writ of error or appeal, unless there be summons and severance, or the equivalent. Williams v. Bank, 11 Wheat. 414, 6 L. Ed. 508; Owings v. Kincannon, 7 Pet. 399, 8 L. Ed. 727; Wilson v. Insurance Co., 12 Pet. 140, 9 L. Ed. 1032; Smyth v. Strader, 12 How. 327, 13 L. Ed. 1008; Masterson v. Herndon, 10 Wall. 416, 19 L. Ed. 953; The Protector, 11 Wall. 82, 20 L. Ed. 47; Hampton v. Rouse, 13 Wall. 187, 20 L. Ed. 593; Simpson v. Greeley, 20 Wall. 152, 22 L. Ed. 338; Feibelman v. Packard, 108 U. S. 14, 1 Sup. Ct. 138, 27 L. Ed. 634; Estis v. Trabue, 128 U. S. 225, 9 Sup. Ct. 58, 32 L. Ed. 437; Downing v. McCartney, 131 U. S. xcviii., 19 L. Ed. 757; Mason v. U. S., 136 U. S. 581, 10 Sup. Ct. 1062, 34 L. Ed. 345; Dolan v. Jennings, 139 U. S. 385, 11 Sup. Ct. 584, 35 L. Ed. 217; Hardee v. Wilson, 146 U. S. 179, 13 Sup. Ct. 39, 36 L. Ed. 933; Ingelhart v. Stansbury, 151 U. S. 68, 14 Sup. Ct. 237, 38 L. Ed. 76; Davis v. Trust Co., 152 U. S. 590, 14 Sup. Ct. 693, 38 L. Ed. 563; Sipperly v. Smith, 155 U. S. 86, 15 Sup. Ct. 15, 39 L. Ed. 79; Railway Co. v. Evans, 175 U. S. 723, 20 Sup. Ct. 1023, 44 L. Ed. 337; Fordyce v. Trigg, 175 U. S. 723, 20 Sup. Ct. 1024, 44 L. Ed. 337.

The supreme court has declared that the matter is jurisdictional, and may be raised at any time before final disposition of the appeal; and we have, in conformity with that ruling, so held in this court. Hook v. Trust Co., 36 C. C. A. 645, 95 Fed. 41; Kidder v. Safe-Deposit Co. (C. C. A.) 105 Fed. 821.[1] An appeal or writ of error by one of several defendants in a joint judgment allowed at the term at which the judgment was rendered can be sustained upon the ground that during the term all the parties thereto are to be deemed present in court, and that the allowance of the appeal or writ of error by the court is equivalent to summons and severance. McNulty v. Commissioners, 39 C. C. A. 545, 99 Fed. 328. This case, however, does not fall within that ruling. The prayer for an appeal is in no proper sense a part of the bill of exceptions. The office of that paper is to place upon record things occurring at or before judgment which would not otherwise be a part of the record. The bill here mentions a prayer for an appeal instead of a prayer for a writ of error, and in that respect is manifestly inaccurate. No assignment of errors was then filed, and, if the statement in the bill may be held to indicate an attempt to sue out a writ of error, it was abandoned; for at a subsequent term plaintiff in error presented his petition for a writ of error, with a proper assignment of errors, which was then allowed, and the bond previously filed, by a liberal construction of the order, may be deemed to have been approved. It cannot be said that any writ of error was allowed or sued out during the term at which the judgment was rendered, and, as the judgment was joint against all the defendants, the writ of error should have been on behalf of all, or there should have been summons and severance. The object of the rule is that the appellate court shall not be twice vexed with the same case and the same question, when one appeal or writ of error will suffice. It is said,

[1] 44 C. C. A. 593.

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however, that at most the failure to join the joint judgment debtors in the writ of error or to obtain summons and severance is an irregularity only, and may be waived, and is waived by the filing of briefs to the merits; that the case is like that of a suit against but one of two or more joint debtors, in which case the objection to the defect of parties should be taken by plea in abatement, or the defect is waived. This contention is not without merit, and is not without much force, and seems to be sustained by several decisions in the state courts. We are, however, concluded upon this question by the decision of the supreme court of the United States, which holds the question to be jurisdictional, and that "where there is a substantial defect in a writ of error, which this court cannot amend, it has no jurisdiction to try the case." Wilson v. Insurance Co., supra. The writ of error is dismissed.

(107 Fed. 633.)

HUTCHINSON COOPERAGE CO. v. SNIDER.

(Circuit Court of Appeals, Seventh Circuit. April 22, 1901.)

No. 732.

1. EXPERT OPINION—MACHINERY.
   Where the facts touching the question whether a machine was impracticable and unsafe cannot be fully communicated to the jury, expert opinion is competent.
2. ASSIGNMENT OF ERROR—INSTRUCTIONS.
   An assignment of error to the giving of an instruction containing a number of propositions cannot be considered where the particular proposition of law objected to, or the grounds of objection, are not pointed out.

In Error to the Circuit Court of the United States for the Western District of Wisconsin.

V. W. James, for plaintiff in error.
W. W. F. Bailey, for defendant in error.

Before WOODS, JENKINS, and GROSSCUP, Circuit Judges.

PER CURIAM. This action was for personal injury suffered by the defendant in error while employed by the plaintiff in error at Greenwood, Wis., in operating a machine used for "butting and ripping bolts." It is alleged that the machine was not a fit one for the use to which it was put; that, in particulars stated, it was defectively constructed; and that the plaintiff, being inexperienced in the management of it, and without knowledge of the peculiar dangers to which he was thereby exposed, was taken from his regular and proper employment, and, without proper instruction, was put to operating the machine, and in operating it suffered the injury complained of. The defendant asked the court to direct a verdict for the defendant, but does not seem to have pointed out in what respect the evidence was supposed to be insufficient. See Adams v. Shirk, 43 C. C. A. 407, 104 Fed. 54. We are of opinion, however, that there was sufficient evidence upon every vital question to warrant the submission of the case

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to the jury. It would serve no good purpose to rehearse the testimony.

Error is assigned upon the giving of an instruction which, as set out in the specification, contains a number of propositions; and the specification fails to state the particular proposition of law objected to, or the grounds of objection. Stewart v. Morris, 37 C. C. A. 562, 96 Fed. 703; Columbus Const. Co. v. Crane Co., 40 C. C. A. 35, 98 Fed. 946; Id., 41 C. C. A. 189, 101 Fed. 55. We are of opinion, however, that the instruction was proper.

The court permitted witnesses to testify that a machine like a model put in evidence was impracticable and dangerous. This, it was objected, was an invasion of the province of the jury. When, however, the subject is one concerning which expert testimony is proper, it is not a good ground of objection that the opinion of a witness embraces "the point to be decided by the jury." Transportation Line v. Hope, 95 U. S. 289, 297, 24 L. Ed. 477. And when the inquiry is whether a machine is properly constructed, or is suitable for the use to which it is put, whether it can be operated without danger, or in what respects it will be dangerous to the one operating it, there can be no doubt that the testimony of experts will ordinarily be competent. Car Co. v. Harkins, 5 C. C. A. 326, 55 Fed. 932; Biscuit Co. v. Rouss, 20 C. C. A. 555, 74 Fed. 608; Daly v. City of Milwaukee, 103 Wis. 588, 79 N. W. 752; Fitts v. Railroad Co., 59 Wis. 323, 18 N. W. 186; Lawson, Exp. Ev. c. 5, "Mechanics & Workmen," passim. The witnesses, to whose testimony objection was made, each testified with reference to a model which was assumed to be a correct representation of the original machine, and, after stating his opinion that a machine so constructed was impractical and unsafe, in response to interrogation stated in what particulars he regarded the apparatus as defective in construction and dangerous in operation; and, when all the facts can be gotten before the jury in that way, it is certainly the better, and perhaps the only proper, practice that a witness, instead of being allowed to express a general opinion, shall be required to point out in what respects, if any, he considers the machine defective or dangerous; but, where the facts touching the question cannot be fully communicated to the jury, the competency of expert opinion is clear, and it is not apparent that in this instance the opinions expressed were improperly admitted. The judgment below is affirmed.

(107 Fed. 634.)

NEW YORK INSULATED WIRE CO. v. BROADNAX.

(Circuit Court of Appeals, Second Circuit. March 6, 1900.)

No. 102.

EMPLOYMENT—RIGHT TO DISCHARGE.

The making of an improvident contract by an electrical engineer with his assistants, which is corrected, at his employer's request, as soon as made, does not, as matter of law, justify his discharge, but is to be considered on the question of his alleged misconduct in acting against the employer's pecuniary interest and in failing to render faithful service.

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In Error to the Circuit Court of the United States for the Southern District of New York.

The defendant in error (hereinafter called the "plaintiff"), as assignee of the claim of Francis Broadnax against the plaintiff in error, the New York Insulated Wire Company (hereinafter called the "defendant"), for damages for the breach of a contract of employment, brought an action at law against it in the circuit court for the Southern district of New York, and recovered a verdict for $2,818.99, upon which verdict judgment was entered. This writ of error was brought to review that judgment.

Henry B. Twombly, for plaintiff in error.

Henry A. Bowman, for defendant in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. On July 5, 1892, the defendant employed Francis Broadnax as electrical engineer for two years from August 20, 1892, at the salary of $4,000 per annum. The immediate engineering work which he was to enter upon was to make plans for, have the charge of, and inspect the work incident to the defendant's subcontract with the Westinghouse Electric & Manufacturing Company for wiring at the World's Fair. The last-named company had the contract for the entire electrical work. This subcontract was one of importance, for it required the use of nearly 2,000,000 feet of wire, and the installation of between 63,000 and 64,000 lights, upon ground about one and one-half miles long, and, exclusive of the Midway, from a half mile to three-fourths of a mile wide. This work was completed with reasonable promptness, in view of unforeseen requirements and changes by the officers of the World's Fair, was turned over to the Westinghouse Company on June 28, 1893, and was apparently accepted. Broadnax was discharged the day before. After his discharge the defendant continued to do electrical work in the buildings until November, 1893. At first Broadnax had charge of the work, with two of the witnesses, Swallow and Harris, as his assistants. Swallow was assistant engineer. His duty was to lay out the plans for the work, and he had some part in seeing that they were executed, while Harris had direct charge of the men at work, and also saw that the plans were carried into effect. In February, 1893, James W. Godfrey was appointed by the defendant its business manager in the Fair, and remained in Chicago until August, 1893. Upon the trial, the plaintiff rested, after having put Broadnax upon the stand to make out his prima facie case, who was subjected to a brief cross-examination. The defendant introduced its witnesses, and, after it rested, Broadnax briefly contradicted some of their statements. The defendant endeavored to justify the discharge by testimony of alleged misconduct in the following respects:

"(1) He was generally inattentive to his work, and did not give his personal inspection to the work, as he had agreed to do, and as ordered more than once by the company, with resultant loss to the company, as hereinafter more fully set forth. (2) He disobeyed express orders of the company. (3) He did not give proper supervision to the work of the Standard Underground

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Cable Company under its subcontract, with the result that company never had any complete report of the work of the cable company, to its disadvantage in its suit against the cable company. (4) He knowingly employed unnecessary, useless, and incompetent workmen, at the expense and to the detriment of the company. (5) He used the services of employés of the company as spies upon other workmen employed by Godfrey, the business manager of the company, in his fight against Godfrey. (6) He knowingly made contracts of employment with Swallow and Harris which were improvident and unauthorized. (7) He made negligently inaccurate reports to the company. (8) He purposely failed and neglected to attend the joint meetings of the heads of the various departments of the electrical work at the Fair, though it was a part of his duty, and though he was frequently requested, to do so. (9) He knowingly and willfully attempted to get Swallow and Harris to be unfaithful to their duties to the company."

The defendant's principal witnesses were Gallaher, the secretary and managing director of the defendant, who was at the World's Fair 17 or 18 times during Broadnax's term of service, Harris, Swallow, and Ruebel, the president of a St. Louis corporation which had a subcontract with the defendant in its wiring business at the Fair. Godfrey, though in court at the trial, was not examined. The defendant, being of opinion that these witnesses made out a strong case, and that the discharge was justified on the facts as shown by undisputed evidence, moved, at the close of the entire testimony, for a direction of a verdict for the defendant, which was denied. It will be seen, by looking at the charges of misconduct, that much of the evidence in support of them would naturally rest upon Swallow and Harris, who were the daily assistants of Broadnax. Harris testifies that the most marked alleged acts of infidelity to the pecuniary interests of the defendant were committed with his help. They testified that idlers and incompetent persons were kept upon the pay roll by the orders of Broadnax; that he attempted to induce them to be unfaithful and to delay the work; that he disobeyed the defendant's general order which required him to be in the office daily between certain hours, and to be upon the work at other times. Gallaher testified in regard to his inattention to business, his lack of push, and the unexpected cost of the work. Swallow testified that Broadnax was in the office, day after day, in idleness, and Ruebel testified that he could not be found during the office hours. The witnesses Swallow and Harris testified with sufficient vigor, but the testimony of Harris shows that its value was uncertain, and with respect to the main uncontradicted point, in regard to neglect to attend the joint meetings of the heads of the various departments at the World's Fair, its importance, as it came from the lips of the witnesses, was because it corroborated the views of Gallaher respecting the laziness and inattention to business of Broadnax, rather than because of itself it constituted a cause of discharge. The question of the existence of adequate reasons for the discharge properly belonged to the jury.

The next point is that the omission or the refusal to charge as requested in divers particulars, especially that the omission to charge that a verdict for the defendant must result if certain particularly specified acts were found to have been committed, was erroneous and misled the jury. The defendant presented 22 requests to charge.

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Many of them were intended to direct the attention of the jury to particular acts, and called upon the court to instruct them that, if a particular act was found to have occurred, discharge was justifiable. The omissions to charge the requests from 5 to 13 are the alleged errors which are chiefly relied upon, and which are as follows:

"(5) If the jury believes that Broadnax did not give daily and personal inspection to the work of the New York Insulated Wire Company, as ordered and directed by said wire company, and thereby became unfamiliar with its work, to the damage of the wire company, then the discharge of Broadnax was justifiable. (6) If the jury believe that Broadnax did not give proper inspection of the work of the Standard Underground Cable Company, that Broadnax did not obtain proper reports of the work of the Standard Underground Cable Company, so as to make it impossible for the New York Insulated Wire Company to know the character of the work performed by the Standard Underground Cable Company, to the detriment of the New York Insulated Wire Company, then the discharge of Broadnax was justified, and the verdict of the jury should be for the defendant. (7) If the jury believe that Broadnax refused and neglected to attend the meetings between the chief engineer of the World's Fair, the Westinghouse Company, the Standard Underground Cable Company, and the New York Insulated Wire Company, purposely and without good excuse, and by reason of such refusal and neglect became unable to properly direct the work of the New York Insulated Wire Company, in accordance with his contract of employment as chief engineer, then his discharge was justifiable. (8) If the jury believe that, because of his disagreement with Godfrey, who had been sent to Chicago as head of the business department of the New York Insulated Wire Company, Broadnax neglected his work, and employed his time and that of his men in his quarrel with Godfrey, then his discharge was justifiable. (9) If the jury believe that Broadnax told Harris to make the work at the World's Fair cost as much as possible to the New York Insulated Wire Company, and Harris, acting under such orders, employed an unnecessary number of men upon the work, then his discharge was justifiable. (10) If the jury believe that Broadnax ordered that a man whose name was Andy Anderson should be kept on the pay rolls in spite of the fact that he did little, if any, work, and, in accordance with such orders, Harris did keep said Anderson on the pay rolls, and punched full time for him, then the discharge of Broadnax was justified. (11) If the jury believe that Broadnax told Swallow to make the work cost as much as possible to the New York Insulated Wire Company, then the discharge of Broadnax was justifiable. (12) If the jury believe that Broadnax purposely and knowingly acted against the interest of the company, in any way, in the discharge of his contract, then his discharge was justifiable. (13) If the jury believe that Broadnax knowingly and without authority entered into a contract with Harris and Swallow, whereby it was provided that, in the case of dismissal for any cause before the expiration of their time of employment, their salary was to be paid to them to the end of the term in full, then such action on the part of Broadnax justified the company in discharging him."

The trial judge evidently thought that the strength of the defendant's case was the testimony in regard to Broadnax's lack of financial integrity, general lack of service in the defendant's work, which included the failure to make personal inspections, and the testimony in regard to the enhancing the cost of the work. He did not follow the defendant's itemized requests, but charged the jury generally and in substance that the defendant was not limited in its testimony to the reasons which were given to Broadnax for his discharge when he was dismissed, but could show other and additional reasons, and, if he was making the work more expensive than it ought to be,—if he worked against the interest of his employers, not rendering his serv-

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ices to it fairly, but depriving it of the benefit of his services, so that it was apparent that he was not fulfilling on his part,—that he was not giving the defendant the faithful service to which it was entitled, then there was good ground for his discharge, and the verdict should be for the defendant; that Broadnax was rightfully discharged, if he was unfaithful to its interests, or if, instead of attention to the duties of his employment, he failed substantially to give his employer the benefit of his time and service. In regard to the testimony of a witness that Broadnax had 20 men on his pay roll who were doing nothing, with his approval, and that he had said, "Make it cost as much as you can," the judge charged that, if the testimony was believed, it furnished adequate cause for a prompt dismissal. He further said that the number of witnesses did not control the result, but that if the testimony satisfied the jury that Broadnax was fairly and reasonably attending to his business, doing faithfully what he had agreed to do, then the verdict should be for the plaintiff; but, if it showed that he was hostile to his employer, taking part against it, was not serving it, but was trying to make the work cost as much as he could, the verdict should be for the defendant. In regard to the point of disobedience to the defendant's orders, the charge was that he was in its employment, and should obey its reasonable directions, but that it was a subject for the consideration of the jury, in view of the magnitude of the work and its details, whether the orders in regard to the duration of the office hours, and the hours of attendance upon the outdoor work of inspection, could be exactly and literally complied with. In reply to a request to charge particularly the seventh request, the court said:

"I will leave that as I have charged,—that they are to weigh all this evidence as bearing upon the question as to his failure to attend the meetings of the chief engineer of the World's Fair and the Westinghouse Company; that is, the jury may consider if he did that purposely, without good cause. I do not turn the case on his failure to attend those meetings, but the jury may consider whatever there was to that on the question that I submit to you, as to whether he was carrying out his contract."

These were meetings called by Pierce, the chief engineer of the World's Fair, of the heads of the clerical departments, in which verbal instructions were given by Pierce to the departments how to expedite and finish up in harmony the work under way. Swallow attended them, as representing the defendant. Mr. Gallaher requested him to go. Broadnax attended but two of them, although Swallow testifies that he asked him to go, and thought that he should have gone. On June 3d, Gallaher asked Broadnax to attend a meeting to be composed of Pierce and three electrical managers and the electrical and business department of the defendant, with a view of laying out the work towards speedy completion, unless his physician forbade it. Broadnax replied that his physician did not approve of his presence at the meeting. On June 21st, Gallaher requested Broadnax and Swallow to meet Pierce and Keller, of the Westinghouse Company, that evening, at an important interview called by Pierce. Broadnax replied that it would be impossible for him to be at the meeting on account of a previous engagement, and that he was busy upon some trouble,—in the work or among the workmen, as is supposed. These

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two classes of meetings are those referred to in the seventh request and the sixth additional request, which was as follows:

"(6) If the jury believe that Broadnax refused to attend the meetings between the chief engineer of the World's Fair, the Westinghouse Company, and the wire company, and that such meetings were necessary for the proper carrying out of the work of the wire company, then his discharge was justified."

In our opinion, the testimony on the subject justified the refusal to place the weight upon these meetings which the defendant's counsel desired. They were circumstances to be considered in the determination of the question of the attention which Broadnax paid to his business, and have a less important position in the record than in the argument of counsel. The facts in regard to the thirteenth request are that on or about April 10, 1893, Broadnax made contracts with Swallow and Harris in regard to their services and salary, and in each contract the clause in regard to the payment of salary was not businesslike and was too favorable to the employés. The defendant forthwith sent for Broadnax to come to New York, objected to those clauses, they were altered in accordance with the defendant's wishes, and he returned to the Fair. The court properly refused to say that if an electrical engineer made an improvident contract with his two assistants, which was corrected at the defendant's request, as soon as made, such single act, as matter of law, justified the company in discharging him from the position of its electrical engineer, but charged them that the act was to be considered upon the question of his alleged misconduct in acting against their pecuniary interest and in failing to render faithful service. An inspection of the record leads to the result that the strength of the defendant's case against Broadnax was properly estimated by the trial judge, and consisted in a general lack of attention to the defendant's business, lack in thoroughness of inspection of the work, and want of thoroughness of oversight, so that "the work grew away from him," and he became inert in the service of the defendant. We do not find that any substantial error was committed in the presentation of the defendant's side of the case to the jury. The judgment of the circuit court is affirmed, with costs.

(107 Fed. 644.)

BROOKLYN HEIGHTS R. CO. v. MacLAURY.

(Circuit Court of Appeals, Second Circuit. April 3, 1901.)

No. 134.

1. PERSONAL INJURIES—PLEADING.
   Injury to eyesight may be proved under a complaint alleging that plaintiff was hurled forward with such force as to bruise her knee, wrench her arm, and "otherwise seriously and grievously injure her."
2. SAME—EVIDENCE.
   The question of whether plaintiff's impairment of eyesight was attributable to the accident, where she received blows on other parts of the body, and a nervous shock, should not be left to the jury, there being no testimony or proof that such blows might be expected to produce such impairment.

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In Error to the Circuit Court of the United States for the Eastern District of New York.

This cause comes here upon a writ of error to review a judgment of the circuit court, Eastern district of New York, entered upon the verdict of a jury in favor of defendant in error, who was plaintiff below, for $4,000 damages for personal injuries suffered by reason of the negligence of plaintiff in error, which was defendant below.

John L. Wells, for plaintiff in error.

Milton Hopkins, for defendant in error.

Before LACOMBE, Circuit Judge, and THOMAS, District Judge.

LACOMBE, Circuit Judge. It is not disputed that defendant was negligent, and there is no contention that plaintiff, who, on June 8, 1898, was a passenger on one of defendant's cars, was guilty of any contributory negligence. That plaintiff was entitled to a verdict in some amount is conceded, but it is contended that $4,000 is an excessive sum. The amount of the verdict, however, is not reviewable here. There remains, therefore, but a single question for discussion. It is assigned as error that the court admitted certain testimony given by plaintiff herself as to the condition of her eyes subsequent to the accident. The complaint alleges that:

"The plaintiff was hurled forward with such force as to bruise her right knee; sprain, contuse, and shock the right knee joint; wrench her right arm; and otherwise seriously and grievously injure her; and to receive a severe and violent shock to her system, by reason whereof she * * * is, as she believes, permanently injured, so that she will never be as strong or able to pursue her vocation as heretofore."

The proof showed that plaintiff (the car being in collision with another) was thrown from her seat, striking her knee, elbow, and chest. After describing her injuries and condition before and since the accident, plaintiff was allowed, against defendant's objection and exception, to testify as follows:

"I have had trouble with my eyes since this accident. The condition of my eyes at any time since the accident has been, the first summer objects were distorted; I couldn't see properly; and since then my sight has been very strange. I cannot use my eyes any length of time. I have had glasses changed continually, and wear glasses all the time now, which I did not before. The present condition of my eyes, as near as I can state, is there seems to be a lack of power to see. I can't see well. I can't read. I can't sew, and I can't write. I have consulted an oculist in reference to them, and treatment has been prescribed for them. I have had glasses prescribed by the oculist. I have followed out the treatment and purchase of the glasses directed. I wore glasses before the accident for reading occasionally, not constantly. I now wear them constantly."

It was duly objected that these injuries were not specified in the complaint. Such objection is without merit, in view of the comprehensive phrase, "otherwise seriously and grievously injure her," which will be found in the excerpt from the complaint supra. If defendant wished to be more specifically advised what alleged injuries resulting from the accident it was called on to respond for, it should have moved for a bill of particulars. It was further objected that the trouble with her eyes was not shown to be con-

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nected with the accident. The order of proof is largely in the discretion of the trial court, which may properly admit evidence of symptoms first, and evidence as to the cause thereof afterwards. The circumstance that counsel for plaintiff asked these questions about the eyesight was no doubt taken as an indication that he intended subsequently to call some competent witness who would testify that blows or a nervous shock such as the plaintiff received have been known to produce, or were competent to produce, such affection of the eyesight. No such proof, however, was produced. The plaintiff's regular physician, and an eminent surgeon who had been called in consultation, testified at great length to her other injuries; but no one made any statement which could possibly be stretched into an assertion that there could be any causal connection between the blow and its resultant injuries and the impaired eyesight. Plaintiff having rested, defendant's counsel moved to "strike out all the testimony of the plaintiff given by her to the effect that she has had trouble with her eyes, on the ground that it has not been connected or shown that it came from this accident, or from any injury she received at the time and place mentioned in the complaint." The motion was denied, and defendant excepted. Inasmuch as neither the court nor the jury can assume without proof that a blow on the knee, elbow, or chest, or a nervous shock ensuing thereon, may be expected to produce an impairment of the eyesight such as plaintiff had described, it was error to deny this motion. It is contended that it was harmless error; that it was cured by the charge. After discussing the nervous disturbance complained of, the judge charged:

"In this connection, perhaps, attention should be called to the alleged injury to the eyes. The plaintiff states that before the accident she used glasses simply for reading, and now she uses glasses constantly. There is no evidence whatsoever of any organic injury to the eye. There is no evidence of any local injury. Therefore you would be limited to determine that any impairment of sight arose from some general effect upon the whole system arising from the accident, if you should so find the fact to be. At least, you could go no further than that."

He further charged that:

"On this question of damages the burden of proof is on the plaintiff. It is her duty to convince you by preponderance of evidence that she has sustained injury, and also that the injury arose from the accident, and not from other cause. That means that there should be a greater weight of evidence—that the quality and convincing power of force of the evidence offered in her behalf should be greater—than that offered by the defendant."

Exception being taken to the charge as to impairment of sight, the court added:

"Perhaps I entered too far into the medical phase of the matter. I will modify that statement by saying, if they find her impairment of sight is attributable to this accident in any way, they can make compensation for it. What I desired to call the attention of the jury to was that there was no evidence of organic lesion or local lesion, and therefore that it must have been some general condition of the body that produced the impairment, if anything. But I leave the jury to say what the impairment of sight came from, and allow them to give compensation if they find it arose from this accident."

To which defendant excepted.

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We are not satisfied that this language cured the error in refusing to strike out all the evidence as to impaired eyesight. On the contrary, by leaving it to them to find whether or not the impairment was attributable to the accident, the jury must have understood that there was, in the opinion of the court, some evidence in the case, which, if it were credited, would establish a causal connection between the two. But in fact there is not a scintilla of any such evidence in the case. We cannot tell from their verdict whether or not the jury gave anything for the impaired eyesight, and cannot say that the damages were not increased by allowing the plaintiff's testimony as to her inability to read, write, and sew to remain in the case.

The judgment is reversed; new trial ordered.

(107 Fed. 646.)

TRIBUNE ASS'N v. FOLLWELL.

(Circuit Court of Appeals, Second Circuit. April 3, 1901.)

No. 100.

1. LIBEL—EVIDENCE—RELEVANCY.
   Evidence of how many newspapers composed a press association from which defendant indirectly received a libelous dispatch which it published, where they were located, and to what ones the dispatch was sent, was irrelevant, there being no suggestion that defendant was one of them.

2. SAME.
   Evidence that, prior to the date of a libelous dispatch published by defendant, none of the dispatches sent out during a witness' administration of a press association, of which he was superintendent, and from which the dispatch in question was indirectly sent to defendant, had been the basis of a libel, was properly excluded as immaterial and irrelevant.

3. SAME—DEMAND FOR RETRACTION.
   Evidence that plaintiff had never demanded a retraction of such association was irrelevant.

4. SAME—DEFENSE—PARTIAL SUPPRESSION OF LIBEL.
   That a part of a libelous story discreditable to plaintiff was suppressed is no excuse for defendant when sued for publishing the rest of it.

5. SAME—CUMULATIVE EVIDENCE.
   Where, in an action for publishing a libelous dispatch, a witness concerned in its publication had already answered that he knew nothing at all about plaintiff, a question as to whether he knew of plaintiff's history in a place where he formerly resided was properly excluded.

6. SAME.
   Where a witness who wrote a libelous article, for the publication of which action was brought, had already testified that trust in a reporter's accuracy made him accept the story, a question as to what were the grounds of his belief of the truth of the facts stated in the article might fairly have been excluded as cumulative.

7. SAME.
   Where plaintiff, suing for libel, offered no evidence to support an unnecessary allegation of character and reputation, there was no error in excluding evidence intended to contradict such allegation.

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8. SAME—EVIDENCES OF OTHER OFFENSES NOT IMPUTED.
It is no defense to a libel that plaintiff has been guilty of offenses other than those imputed to him, or of offenses of a similar character, and such facts are incompetent in mitigation of damages, their only tendency being to show, not that plaintiff's reputation was bad, but that it ought to be bad.

9. SAME—WAIVER OF PART OF LIBEL—EFFECT.
By plaintiff's waiver of so much of a libel sued for as charged his incompetency, defendant stood fully justified as to that part of the libel, and evidence to show incompetency was properly excluded.

10. SAME—WITNESSES—CROSS-EXAMINATION—REFRESHING RECOLLECTION.
A witness called by defendant in an action for libel charging plaintiff with robbing his employer represented plaintiff's employer during his employment, made his reports to him, saw the checks given to plaintiff, and audited statements made by plaintiff of his expenditures. With a book before him he was asked on cross-examination to refresh his recollection, and state what apparent balance, if any, plaintiff had in his hands, on a certain date, belonging to his employer. He answered that according to the book he had a balance which he specified. Thereupon motion was made to strike out the answer "on the ground that witness cannot refresh his recollection, as he says, 'according.'" *Held* that, the figures in the book being his own, made when he went over the accounts with plaintiff, and representing what he then believed was the correct balance, the answer was properly allowed to stand.

11. SAME.
Defendant was properly allowed to ask him on cross-examination whether he knew of a single dollar of his principal's money that plaintiff ever embezzled or stole.

12. SAME—INTRODUCTION OF ACCOUNT BOOK—PRELIMINARY EVIDENCE.
Plaintiff, suing for a libel charging him with robbing his employer, was properly allowed to state that certain check marks were made in the presence of his wife and himself in a book kept by him, when the items so checked came back to him with the signature of his employer's representative, with whom all the business in question was transacted, saying they were all right, such testimony being preliminary to the offer of the book in evidence.

13. SAME—INSTRUCTIONS.
A charge stated that in one of the paragraphs of the answer defendant averred that each one of the defamatory statements in the publication complained of was and is true in substance, and that it had assumed responsibility for the libel. *Held*, that it could not complain thereof, as its answer avers that "each and every defamatory statement in the publication is and was true, in substance, as follows," and then sets forth several instances in which it alleged that plaintiff charged for and collected more money from his employer than he actually disbursed.

14. SAME.
An instruction stated that "the defendant was not guilty of personal ill-will to the plaintiff, for it did not and had not previously heard of him, but it is said that its conduct in publishing the libel without mitigation and without an attempt to discover whether it was true or false was wanton and reckless, and is equivalent to actual malice." *Held*, that an exception to such passage was without merit.

15. TRIAL—INSTRUCTIONS—REPETITION IN DIFFERENT FORM.
No error can be predicated on a refusal to restate in another form a portion of the charge which correctly and sufficiently stated the proposition requested.

16. LIBEL BY CORPORATION—RATIFICATION—FINDING.
That a defendant corporation's answer in an action for libel reiterated, in substance, the defamation, was sufficient to sustain a finding of subsequent ratification of the publication, which would warrant the jury in considering the circumstances under which it was published, and holding

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it equally liable for any recklessness or wantonness in the publication as if it had originally authorized it.[1]

In Error to the Circuit Court of the United States for the Southern District of New York.

This is a writ of error to review a judgment entered upon a verdict for $5,000 in favor of the defendant in error, who was plaintiff below. The libel appeared April 6, 1895, in the New York Tribune, a newspaper published by the plaintiff in error, who was defendant below. It reads as follows:

"Anson Phelps Stokes Robbed.

"His Former Head Gardener at Lenox Got Away with $6,000 or $7,000.

"Pittsfield, Mass., April 5th. A sensation was caused here and in Lenox today by the disclosure that Frederick S. Follwell, until recently head gardener for Anson Phelps Stokes at the latter's magnificent place in Lenox, was a defaulter to the amount of $6,000 or $7,000. Several months ago Mrs. Stokes, who is an enthusiastic botanist, discovered that Follwell's knowledge of the subject was superficial, and had him discharged. He was engaged to go to Pierre Lorillard's place at Newport. Soon after his departure, Mr. Stokes began to receive bills for which he had already given checks. An investigation showed that Follwell had incurred many bills in his employer's name, and had appropriated checks given to him with which to pay them. When the shortage was discovered, word was sent to Newport with the idea of having Follwell come here and explain, but he was not there, and had not been since he left Lenox, and no trace of him has been found. His wife and child are in this city."

Henry W. Sackett, for plaintiff in error.

Wm. L. Snyder, for defendant in error.

Before WALLACE and LACOMBE, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). There are 97 assignments of error, which may be best discussed within the limits of an opinion by classifying them into certain broad groups, and disposing of the questions which therein arise. This method has been followed in the briefs and argument, but the classification there adhered to may be somewhat modified.

1. Extent and sources of information and grounds of belief: Error is assigned in that the court sustained objections to certain questions put to the witnesses Lyon and Fletcher, and excluded a printed paper marked "Exhibit E." The brief of plaintiff in error discusses at great length the authorities bearing upon the question to what extent a defendant in an action for defamation of character may give proof of the information of which he was possessed when he spoke, wrote, or published; what were the sources of such information; whether he believed his statement to be true; and the grounds of such belief. It will be unnecessary to follow out the elaborate and exhaustive discussion of this subject on authority and precedent. It is thought that a careful history of the libel will make it apparent that the particular exceptions grouped under these assignments of error are without merit. The person who originated the story, so far back as it can be traced, was John C. Lamb, chief reporter on the staff of S. Chester

[1] Liability of corporations for torts, see note to Hindman v. Bank, 39 C. C. A. 9.

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Lyon, who was editor of the Evening Eagle of Pittsfield, Mass., and representative in Central Berkshire of the New England Associated Press. Lamb called Lyon's attention to the subject, and was thereupon directed to make an investigation. Shortly thereafter Lamb made a report to Lyon in form ready for publication. Lyon printed Lamb's report in his paper. He also wrote out a paraphrase of it, which is substantially the same, except that it omitted a statement that Follwell was obliged to leave England on account of money troubles, and that at the time of his departure ugly rumors were in circulation concerning him. Lyon sent his paraphrase of Lamb's report by telegraph to the New England Associated Press. This was an association of newspapers for the collection of news for mutual benefit. Its principal place of business was in Boston. Apparently, the Tribune was not a member of it; no offer to prove such membership was made. The superintendent of the New England Associated Press received Lyon's story, and sent it to another concern known as the United Press. George N. Smith, telegraph editor of the defendant, received a telegram from the United Press containing the same story between 11 and 12 o'clock the night of April 5, 1895. He read it, wrote a head for it, marked the type on it, and sent it to the composing room. It was published in the paper of April 6th, which went to press about 2 a. m. He made no effort to verify it. The paper had no special reporter at Pittsfield. It did have one at Newport, R. I., where, as the libel states, plaintiff was engaged to go. Inquiry there at Mr. Lorillard's would have found him. There was not time to communicate with Newport and get a reply in time for publication in the next day's paper. Had he waited over another day, the article would have ceased to be of any value as news. Apparently, no objection was interposed to any questions put to Smith. He testified that he had no knowledge whatsoever in reference to the plaintiff; had received no information or reason to doubt the accuracy of the dispatch; that he had experience with United Press dispatches, and with regard to their accuracy never had any troubles, except in the case of this dispatch; that he did not know anything special about the care which they took in preparing their dispatches, or their methods,—simply that they furnished news to the papers witness had been employed by, and that their news was found to be correct; that he supposed this article was true. Fletcher, superintendent of the New England Associated Press, testified that Lyon had been representative of the concern in Pittsfield and vicinity for about five years, and had conducted himself so as to inspire the utmost confidence; that his trustworthiness as a reporter of news was at the time unquestioned; that witness did not know plaintiff, had no animosity or malice, and at the time he sent the dispatch believed it to be true. He testified to the care used in selecting correspondents of good character and first-class standing, and in training or instructing them. He was not allowed to testify how many newspapers composed his association, and where they were located, and to what newspapers he sent the dispatch. There being no suggestion that defendant was one of them, the evidence sought to be elicited was manifestly irrelevant. Nor was he allowed to testify that prior to April 5, 1895, none of the dis-

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patches sent out during his administration had been the basis of an action for libel; nor that plaintiff had ever demanded a retraction. Such testimony was properly excluded as immaterial and irrelevant. Lyon testified that, to the best of his knowledge, Lamb had been in the newspaper business six years, and about four months with the witness, who trusted his reports entirely; that he had known his connection and his work in other capacities, so that he had every reason to trust him. Lamb was dead, and therefore no evidence could be offered as to what investigation he made, what information he had, what were the sources thereof, what he believed, and what were the grounds of his belief. The court excluded the printed copy of the report of Lamb as printed in the Pittsfield paper (Exhibit E). The record already showed that the entire story which Lyon sent to the New England Associated Press was taken from the report made to him by Lamb, and that his sole source of information was Lamb. That, in addition to the story forwarded and ultimately published in the Tribune, Lamb told him that plaintiff was obliged to leave England on account of money troubles, and that there were ugly rumors in circulation concerning him, was wholly immaterial. Lyon had no connection whatever with the Tribune, and the fact that he suppressed a part of a story discreditable to plaintiff is no excuse for the defendant when sued for publishing the rest of it.

The other exceptions relied on are to the exclusion of two questions. The first is: "Did you, at the time you wrote the article which you hold in your hand, and as published in the Tribune, know of Mr. Follwell's history in England?" This was manifestly improper, for the witness testified that he knew nothing at all about the plaintiff; Lamb's story being all he had heard. The other question is: "What were the grounds of your belief of the truth of the facts stated in the article which you say you had written for the Tribune?" This might fairly have been excluded as cumulative, for he had already testified that his trust in Lamb's accuracy made him accept his story; and in the discussion which followed the objection to this last question he again testified that the sources of his information did not lie outside of his own staff, and were mere rumors. The plaintiff in error argues at great length that in libel suits the newspaper should be allowed to show with what care its agencies for gathering news are conducted, and anything which may throw light upon their trustworthiness. In the case at bar, defendant was allowed to go into all such details as fully as it chose, except as above indicated, and certainly has been denied no proper opportunity to show what measure of care it took.

2. Other and different offenses: It is contended that the court erred in excluding evidence of what plaintiff had done in England. What defendant sought to prove was that while a member of a partnership, and during the illness of his partner, he collected £200 from debtors of the firm, appropriated it to his own use, and left the country, the firm being made bankrupt thereby. It is made a felony by statute for a bankrupt to quit England with £20 of property which should be divided among creditors, if he does so with intent to defraud. An attempt was also made to show that he shamefully abused

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his first wife in England, and left her destitute. It was sought to sustain the introduction of such evidence on these grounds: (a) That it was competent under one of the issues raised by the pleadings. The complaint averred that plaintiff had been engaged for many years in business of great trust and responsibility, and had so conducted himself and his said business that at the time of the acts hereinafter set forth he had enjoyed a good name and reputation, and a character and credit among all people for the faithful performance of all his duties. These averments are specifically denied by the answer. (b) In mitigation of damages, in disproof of damages, in disproof of malice, as facts of which the writer of the article had information at the time of writing and transmitting that article. (c) As competent in reduction of damages under section 536 of the Code of Civil Procedure. (d) As competent in mitigation as giving color to the charge of dishonesty in the Tribune article, by way of modification. The first of these grounds is insufficient for the reason that plaintiff introduced no testimony in support of these unnecessary averments. None of the authorities cited on the brief sustain defendant's contention. In Stafford v. Association, 142 N. Y. 598, 37 N. E. 625, the plaintiff called witnesses to support similar allegations, similarly denied, and defendant objected to their testifying. The objection was held unsound on the ground that defendant had opened the door by denying the unnecessary allegation. The situation is very different where plaintiff closes his case with no offer of evidence in support of such unnecessary allegations. Keegan v. Sage, 31 Abb. N. C. 54, 25 N. Y. Supp. 78, McIntyre v. Ogden, 17 Hun, 604, and Dovan v. Dinsmore, 33 Barb. 86, are all decisions on motions to reform the pleadings. As to the second ground, it is clear from the evidence that, of the "facts" sought to be proved in mitigation of damages, no one in the Tribune Association, nor any one connected with it or in its employ, had any information whatever. Touching the third and fourth grounds, it is sufficient to refer to the former decision of this court in Association v. Schenck, 40 C. C. A. 163, 98 Fed. 925, where the whole subject was considered, and it was held:

"It is not a defense to a libel or slander that the plaintiff has been guilty of offenses other than those imputed to him, or of offenses of a similar character; and such facts are not competent in mitigation of damages. The only tendency of such proof is to show, not that the plaintiff's reputation is bad, but that it ought to be bad."

The same principle covers exceptions to the exclusion of evidence tending to show that plaintiff had solicited or received commissions from tradesmen upon bills of goods bought for Mr. Stokes, and that he had solicited another employé to unite with him in the claim that they were both engaged under a contract by which they were to have six months' notice of discharge.

3. As to the charge of incompetency: The article in the Tribune charged that plaintiff's knowledge of botany was superficial. If false, this was libelous, and the answer contains many averments, which, if proved, would justify the charge. When the case came on for trial, defendant, which had denied publication and circulation, made sufficient admissions to relieve the plaintiff from making proof there-

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of, and "plaintiff thereupon waived the alleged libel of superficial knowledge of botany." Under these circumstances, we do not think it was error to exclude testimony of mismanagement of rosebushes and of ferns. By plaintiff's "waiver," defendant stood fully justified as to that part of the libel, and no evidence was needed to show that for such publication plaintiff had no ground of complaint against it.

4. Some minor matters of evidence: One of the witnesses, James W. McCulloch, called by defendant, represented plaintiff's employer during all the time of his employment. Plaintiff made his reports to him, he saw the checks given to the plaintiff, and went over and audited the statements made by plaintiff of his expenditures. On cross-examination he testified that the statements were in court, produced one, and testified without objection that it covered the month of February, and showed a certain balance. He was then asked: "Q. Is that statement that you have there an exact copy of the account which you see on page 3 of this book?" This was objected to on the ground that the book was not in evidence, and exception reserved; but, so far as the record shows, the question was never answered. The same witness, with a book (Exhibit 5 for identification) before him, was asked to refresh his recollection, and state what balance, if any, plaintiff had in his hands on a certain date belonging to his employer,—what apparent balance. His answer was, "According to the book, he had an apparent balance of about twenty-odd dollars." This was objected to, and motion made to strike out the answer, on the ground that witness cannot refresh his recollection, as he says, "according." It appears, however, that the figures in the book to which he testified were his own, made in pencil at the time he was going over the accounts with plaintiff as the representative of Mr. Stokes, and represented what he then believed was the correct balance. This relieves the testimony from the sting of the particular objection recorded. We see no impropriety in asking, on cross-examination of this particular witness, the man who, of all others, was the most likely to know, whether he knew of a single dollar of Mr. Stokes' money that plaintiff ever embezzled or stole. There was no error in allowing plaintiff to state that certain check marks were made in a book kept by him, in the presence of his wife and himself, when the items so checked came back to him with Mr. McCulloch's signature saying they were all right. The testimony was preliminary to the offer of the book. Plaintiff was entitled to show, and indeed ought to have shown, what the book purported to be, and how it was kept, before offering it. Had it been admitted after this testimony was given as to the check marks, there might be force to the objection that plaintiff could not use his own books of account kept by himself to bolster up his own testimony. But the book was not admitted in evidence, nor even offered, so far as we can find. The exception to the question is unsound.

5. The charge: Error is assigned to four passages in the charge. The first two of these are:

"It is not a defense to a libel that the plaintiff has been guilty of offenses other than those imputed to him, or of offenses of a similar character."

"Proof of the bad character of the plaintiff is competent because one whose character is bad is not entitled to the same measurement of damages as one

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of unblemished fame. This does not mean proof of particular offenses of a similar character to those which are imputed to him in the libel, but proof of general bad character."

This subject has already been discussed. The charge is in conformity to the opinion of this court in Association v. Schenck, supra. The next passage complained of is as follows:

"In one of the paragraphs of the answer it [the defendant] averred that each one of the defamatory statements in the publication complained of was and is true, and has assumed responsibility for the libel."

When attention was called to this, the court qualified it by adding the words "in substance." The answer avers that "each and every defamatory statement in the publication is and was true, in substance, as follows," and then sets forth several instances in which it alleged that plaintiff charged for and collected more money than he actually disbursed. The charge in this particular was undoubtedly sound. The next passage excepted to is as follows:

"The defendant was not guilty of personal ill-will to the plaintiff, for it did not know and had not previously heard of him, but it is said that its conduct in publishing the libel without investigation, and without an attempt to discover whether it was true or false, was wanton and reckless, and is equivalent to actual malice."

It is difficult to understand upon what theory it could be contended that there was any error in this statement. Error is finally assigned for a refusal to charge the proposition:

"Affirmative proof of guilty intention or actual malice on the part of the defendant is required to sustain punitive damages. Absence of proof of defendant's bad motive cannot take the place of affirmative evidence."

In addition to the passages already quoted, the court charged:

"If a person, in publishing a libel of a serious character against an individual, is affirmatively shown to have been guilty of recklessness or wantonness, neither knowing whether it was true or false, or not, nor making any adequate attempt to discover whether it was well founded or not, such wantonness of conduct is justly regarded as actually malicious in its character."

And also:

"Inasmuch as the defendant is a corporation, it cannot be found actuated by malice if it did not authorize the article, or did not ratify it after it was published, because the corporation is not responsible for the actual malice of its employés, if it neither authorized the particular article nor subsequently ratified its publication."

And then follows the passage above quoted, touching the averments of the answer. This was a correct and sufficient statement. Defendant was not entitled to have part of it restated in another form to comply with the request. Irrespective of any question whether the answer was interposed in bad faith or not (which might, if the jury so found, warrant punitive damages), the fact that the answer in substance reiterated the defamatory statements was quite sufficient to sustain the finding of a subsequent ratification of the publication, which would warrant the jury in considering the circumstances under which it was published, and holding the corporation liable for any recklessness or wantonness in such publication as if it had originally authorized it. The judgment is affirmed.

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(107 Fed. 654.)

PECOS VALLEY BANK v. EVANS-SNIDER-BUEL CO.

(Circuit Court of Appeals, Fifth Circuit. March 19, 1901.)

No. 1,016.

1. CHATTEL MORTGAGES—PARTIAL RELEASE—DISPOSAL OF RELEASED PROPERTY—EFFECT OF RENEWAL MORTGAGE.
   If, before the execution of a second renewal chattel mortgage on the same property, included in the first between the same parties, the parties agreed by parol that the mortgagor might dispose of a part of the mortgaged property free from the mortgage liens, and he did so, the rights thereby acquired by third parties to such released property are unaffected by the renewal mortgage.
2. SAME—PROVISIONS—ANNULMENT OR MODIFICATION BY PAROL.
   Provisions of a chattel mortgage of sheep that their wool may be shorn and marketed by mortgagor, with the written consent of mortgagee, and the proceeds applied to the mortgage debt, and that mortgagee may seize or recover the wool, or the proceeds thereof, to apply on the debt and for other mortgage purposes, may be annulled or modified by a parol agreement between the parties.
3. SAME—EVIDENCE.
   Parol evidence of an agreement to annul or modify provisions of a chattel mortgage is not inadmissible because it shows that a pencil memorandum thereof was made by one of the parties, and read by the witness testifying thereto, and which would have been admissible to support such parol evidence if produced and offered for that purpose.
4. SECONDARY EVIDENCE—MEMORANDUM—NOTICE TO PARTIES—NECESSITY.
   Notice to produce a memorandum, as a condition precedent to parol evidence of its contents, was not required, where the party who was claimed to have made it and to have had it in his possession had already testified that it never existed.
5. CHATTEL MORTGAGE—PARTIAL RELEASE—PAROL AGREEMENT—EVIDENCE—QUESTIONS FOR JURY.
   Though, on an issue as to whether prior to the execution of a chattel mortgage in renewal of a prior mortgage the parties agreed by a parol agreement to release from the lien of the first mortgage a portion of the property covered thereby, the renewal mortgage and a pencil memorandum of the parol agreement claimed to have been made by one of the parties at the time are admissible to support or contradict the agreement, the inferences deducible from the difference in the language of the two mortgages, and whether any memorandum was ever written, and, if written, what it contained, were questions for the consideration of the jury.
   Shelby, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Western District of Texas.

On March 25, 1898, J. C. King and W. N. Fowler, composing the firm of King & Fowler, executed and delivered to Evans-Snider-Buel Company, the defendant in error, a chattel mortgage conveying to H. M. Pollard, trustee, 18,400 head of sheep described in the mortgage, including the wool and fleece thereof when shorn, provided the same may be shorn by the mortgagors, and the wool marketed, with the consent of Evans-Snider-Buel Company in writing; the proceeds of the wool to be applied on the indebtedness described in the mortgage, and the mortgagee to have the right to seize or recover the wool, or the proceeds thereof, for the purpose of applying the same upon the indebtedness and for other purposes of the mortgage. The mortgage recited that the enumeration and description of the property was intended to cover and include not only all the sheep owned by the mortgagors,

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but all additions and accretions thereto. On October 28, 1898, King & Fowler executed and delivered to the defendant in error another mortgage, conveying to Pollard, trustee, 18,000 head of sheep therein described, which last-named mortgage recites that "all previous mortgages executed by us in favor of the mortgagee herein, covering the aforesaid sheep, or any part thereof, are not to be extinguished by the execution of this mortgage, but shall remain in full force and effect for the purposes and considerations therein and herein set forth; the above enumeration and description being intended to cover and include not only all the sheep owned by the mortgagors, but all additions and accretions thereto are specially included in and covered by this mortgage." Four days before the date of the mortgage just last described, namely, on October 24, 1898, King & Fowler mortgaged to the Pecos Valley Bank, the plaintiff in error, all of their wool now stored in the warehouse owned by the C. F. Thomason estate, situated in Pecos City, in Reeves county, numbering 186 sacks, marked "K. & F.," and aggregating about 40,500 pounds, to secure the payment of $3,640 that day borrowed of the bank. In all of these transactions King & Fowler were represented by Tom King, under a power of attorney from each of the partners authorizing him to act for them. He (Tom King) sold this wool in May, 1899. He paid the proceeds of the sale to the plaintiff in error on the indebtedness secured by its mortgage on the wool. To recover these proceeds, amounting to $3,390.23, the defendant in error brought its action, claiming, however, a larger amount of damages.

On the trial the defendant in error (the plaintiff below) put in evidence the two mortgages held by it, also the mortgage from King & Fowler to the plaintiff in error, and an admission that the wool in question was shorn by the firm of King & Fowler some time about the first part of October, 1898; that it was shorn from all the sheep that King & Fowler owned at that time, and was placed on storage by them in the warehouse of the estate of Thomason, in Pecos City, in Reeves county, Tex., about the first part of October, 1898; that the wool remained on storage in the warehouse in Reeves county until it was sold and shipped to St. Louis about May, 1899; that the plaintiff in error loaned the firm of King & Fowler $3,640 on October 24, 1898, and took the chattel mortgage on the wool to secure the same; that the wool was sold about May, 1899, and shipped to St. Louis, and that King & Fowler, out of the proceeds arising from the sale of the wool, paid to the defendant, the Pecos Valley Bank, $3,390.23, which was by the bank credited upon the note to secure which the mortgage was given to the bank. Here the plaintiff closed.

Thereupon the defendant introduced Tom King, who testified: That he knew A. T. Atwater; had business dealings with him; negotiated the first loan with him in St. Louis, and also negotiated with him in St. Louis for the renewal of the first mortgage and the giving of the second mortgage given to the defendant in error, all of which negotiations took place at the office of the defendant in error in St. Louis, between the witness and Mr. Atwater, who was then acting secretary for the defendant in error. When the first mortgage was given, Mr. Atwater took down a memorandum, and told the witness to go to his home office, and said Mr. Ware would fix it up. That the witness went from St. Louis to the office of the defendant in error in Ft. Worth, where the first mortgage was drawn up and executed. This witness testified: That he used the money gotten from the Pecos Valley Bank to pay Mr. Bowen and Mr. Thomason for supplies they had furnished to run the sheep, except about $1,800 or $2,000 which he used in buying sheep. That there had been a spring clip of wool shorn from these sheep in the spring of 1898, which clip the witness sold to a man by the name of Prestige, and used the proceeds to pay running expenses of the sheep. That he told the officers of the defendant in error, at its offices in St. Louis and in Ft. Worth, that he had applied the proceeds of the first clipping which was taken from these sheep in the spring of 1898 to pay running expenses of the sheep. That he told this to Mr. Ware, Mr. Atwater, and Mr. Buel. That they did not say anything, and did not make any objections to his having used the wool for that purpose. That he told Mr. Buel, the president of the company, in Chicago, that he had gotten some money on the wool which was stored in

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the warehouse in Pecos City, Reeves county; that he had gotten this money from the plaintiff in error, and also had gotten supplies from Mr. Bowen. That it was in February, 1899, that he gave Mr. Buel this information. That Mr. Buel did not make any objection when told about this. That at the time witness made the first mortgage Mr. Atwater was the secretary of the Evans-Snider-Buel Company. Here the defendant below offered to prove by the witness that, at the time he made the arrangements in St. Louis with A. T. Atwater for the extension of the loan and the execution of the second mortgage, he had an arrangement with Atwater that the wool should not be included in the second mortgage, and that Atwater, acting on behalf of the plaintiff as its secretary, agreed that King & Fowler might sell and use the wool for the purpose of raising means and paying expenses of running the sheep. This evidence was objected to by the plaintiff (the defendant in error) and excluded by the court on the ground "that it varied the terms of the written mortgages, and because no authority was shown authorizing Atwater to bind the plaintiff."

After the defendant below closed its testimony the plaintiff introduced the deposition of its president, M. P. Buel, and the deposition of its vice president, C. A. Snider, each of whom testified, in substance, that he never agreed with King & Fowler that the wool should not be covered by the mortgages to the plaintiff, and never authorized any person to make any such agreement with the plaintiff, and that he never at any time authorized the firm of King & Fowler to sell or dispose of the wool to any one for any purpose, and that there was no understanding or agreement that King & Fowler should dispose of the wool for the purpose of paying the running expenses of the sheep. It also introduced two depositions of A. T. Atwater, who testified, in substance, that he was the secretary and manager of the St. Louis office of the plaintiff when the two mortgages were given to it by King & Fowler; that the mortgages were executed at the Ft. Worth office of the plaintiff, and that he was not present at the time of their execution; that he never made any agreement with King & Fowler that the wool should not be included in the mortgages, and never made any agreement with them, and never had any understanding with them, that they could use the wool for the purpose of raising supplies and means for the purpose of paying the running expenses of the sheep, and never authorized them to so use the wool, or any part thereof; that he made no such agreement with them, or either of them, nor with their representative, Tom King, nor did he authorize any person to make any such agreement with them; that on the 2d of March, 1898, when Tom King came to the office of the plaintiff at St. Louis, the witness there made, in his own handwriting, the memorandum which he attached to his deposition, a copy of which was sent to the Ft. Worth office for the completion of the deal through the plaintiff's representatives there; that he never had any agreement or understanding with Tom King, representing either himself or King & Fowler, that they could use the wool for the purpose of raising means and procuring supplies to enable them to properly care for the sheep, or for any other purpose; that the memorandum attached to his deposition was the only memorandum that he ever made in the premises, and which was made at the time of the arrangement for the first mortgage given, which is dated March 2, 1898.

After this and other testimony had been offered by the plaintiff below, the defendant below again offered to prove by the witness Tom King the following facts: "That some time in the month of September, 1898, he, as the agent and representative of the firm of King & Fowler, went to St. Louis, to the general office of the plaintiff in that city, for the purpose of renewing the first mortgage. That when he arrived there he met A. T. Atwater, who was secretary of the plaintiff, and at that time he stated to the said A. T. Atwater that he had come up there for the purpose of renewing the first mortgage and the indebtedness secured by it, and that the said King & Fowler were unable to properly care for said sheep without having the use of the wool for the purpose of procuring supplies and means to defray the expenses of running the sheep, and that he then stated to the said A. T. Atwater that the said King & Fowler would not be willing to renew the first mortgage unless they could have the privilege of selling the wool, and using the proceeds in

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defraying the expenses of running the sheep. 'I negotiated the first loan, as well as the extension thereof, with Mr. Atwater, in St. Louis, and he attended to the entire business for the plaintiff in connection with the two mortgages; and it was the understanding at the time the first mortgage was executed that the wool was not to be included in the mortgage, and I told Mr. Atwater at the time the second mortgage was executed that the wool was included in the first mortgage, and that I did not know it was so included until after the first mortgage was given; and I then told Mr. Atwater that, unless he would agree to leave the wool out of the second mortgage, King & Fowler would not renew the mortgage, and he agreed to do so.' And it was then agreed by and between the witness Tom King and the said A. T. Atwater that the wool should not be covered by the second mortgage, and that they would extend the time, take new notes and a new mortgage covering the sheep only, and that the said King & Fowler might use whatever wool had been shorn or that should be thereafter shorn from any of the said sheep covered by either of the said mortgages, for the purpose of procuring feed, supplies, and raising means for the purpose of paying the running expenses of the said sheep, and that the wool should be free from the lien of said mortgages, and that at the time of this conversation and agreement between the witness and the said A. T. Atwater at the plaintiff's office in St. Louis in September, and before the second mortgage was executed, and after the said Atwater had agreed with the said Tom King, as the agent and representative of King & Fowler, that the wool should not be covered by the second mortgage, but that all the wool on hand and wool subsequently to be shorn from said sheep might be used by the said King & Fowler for the purpose of raising means and supplies in caring for said sheep, the said A. T. Atwater made a pencil memorandum to that effect, which he said he desired to send to their Ft. Worth office, for them to be governed by in drawing up the second mortgage. That said memorandum was not signed by any person, but was a short memorandum of their agreement, and was read by the witness, which he said he desired to send to the Ft. Worth office, as before stated, for their information there in executing the second mortgage. That after said agreement was made in St. Louis between the witness and said A. T. Atwater, and before the second mortgage was executed, he (the witness) went to Pecos City, and relying upon his agreement with said A. T. Atwater that the said King & Fowler might use all wool on hand and to be shorn thereafter from said sheep for the purpose of raising means and supplies to pay the running expenses from said sheep, and relying upon the same, he borrowed said sum of $3,640 from the defendant, the Pecos Valley Bank, and executed the mortgage to said bank on the wool that was then on storage in the warehouse in Pecos City, which money so borrowed from the defendant was used in paying expenses and debts in connection with the running of the sheep. That the memorandum of their agreement is not the one which the witness A. T. Atwater refers to in his deposition as 'Exhibit A.' That memorandum was made in March, 1898, and is written in ink, and the memorandum to which the witness refers was written in pencil by said A. T. Atwater, and was made in September, at the time they had the oral agreement referred to by the witness." To the introduction of this evidence the plaintiff below objected on two grounds: (1) That the facts showed that there was a written memorandum of the agreement, and that, as the plaintiff had not been notified to produce it, parol evidence was not competent to show its contents; (2) because the testimony offered varied the terms of the written mortgages, and therefore was incompetent. The court sustained the objection on the first ground. Substantially the only contested issue of fact presented on the trial was that to which the rejected testimony of the witness Tom King related; and it having been excluded, as above shown, the court instructed the jury to return a verdict for the plaintiff for $3,390.23, the sum received by the defendant from the proceeds of the sale of the wool. The assignment of errors is to the effect (1) that the court erred in rejecting the testimony of the witness Tom King; (2) that the court erred in directing a verdict for the defendant in error.

Millard Patterson and C. N. Buckler, for plaintiff in error.
A. L. Matlock, for defendant in error.

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Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge, after stating the case as above, delivered the opinion of the court.

As is shown by the foregoing statement of the case, there is some apparent discrepancy as to the grounds on which the objections to the testimony of the witness Tom King were sustained by the court. In the bill of exceptions No. 1 it is stated that this evidence was objected to by the plaintiff and excluded by the court on the ground that it varied the terms of the written mortgages, and because no authority was shown authorizing Atwater to bind the plaintiff. This relates to the ruling announced when the testimony was first offered by the defendant. After the defendant had closed its testimony, and the plaintiff had introduced numerous witnesses in rebuttal touching the agreement (or absence of any such agreement, as was claimed by the defendant, and sought to be supported by the testimony of the witness King), that witness was recalled by the defendant, which again sought to show by him the facts that it had offered to prove by him when he was first on the stand, with such elaboration as the rebutting testimony which had been offered by the plaintiff invited. Thereupon the plaintiff renewed its objection, stating as the grounds thereof (1) that the witness showed that there was a written memorandum of the agreement, and that it was the best evidence of what the agreement was; that, as the plaintiff had not been notified to produce the written memorandum, parol evidence was not competent to show its contents; and (2) that the testimony of the witness was incompetent because it varied the terms of the written mortgages, "which first objection was by the court sustained, and defendant was not permited to introduce the testimony." From this it would seem that the circuit court held that the nature and extent of the proof offered by the plaintiff in rebuttal waived the objection placed upon the ground that the proof varied the terms of the written mortgages, and the objection not being based in any measure on the ground that no authority was shown authorizing Atwater to bind the plaintiff, and it then for the first time appearing that at the time of the negotiations between the witness and Atwater, in the fall of 1898, to which the offered testimony related, Atwater made a short memorandum of their agreement (which was not signed by any person, but was read by the witness), the objection taken that, as the witness showed there was a written memorandum made at the time of the agreement, it was the best evidence of what the agreement was, and that, as the plaintiff had not been notified to produce it, parol evidence was not competent to show its contents, was the objection which was sustained, and on this ground the testimony was excluded.

The plaintiff, in its pleadings, seeks to support its claim or right to recover on the two mortgages taken by it from King & Fowler, and from the wording of the second ground of the objection made to the introduction of Tom King's testimony when it was last offered, at the very close of the trial, it would seem that the trial was conducted on the theory that the plaintiff's claim was supported by the contract of the parties evidenced, by each of the mortgages, or by both of them

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considered together; for the language of the second ground of the objection is, "because it varied the terms of the written mortgages," using the plural number. The rejected testimony tended to prove that in September Tom King, repesenting King & Fowler, and A. T. Atwater, representing the plaintiff, had agreed some time in the month of September, 1898, that King & Fowler might use whatever wool had been shorn, or that should be thereafter shorn, from any of the sheep covered by the mortgage that had been executed, for the purpose of procuring feed, supplies, and raising means for paying the running expenses of the sheep, and that the wool should be free from the lien of these mortgages. The second or renewal mortgage given by King & Fowler to the plaintiff was not given until October 28, 1898, prior to which date the wool in question was mortgaged to the defendant below for cash in hand paid to a larger amount than the proceeds of the sale thereof received by the defendant, and for which the plaintiff recovered judgment in this case. If, therefore, the fact was, as the excluded testimony tended to show, that such an agreement was had between the plaintiff and King & Fowler some time in the month of September, 1898, and that, acting on that agreement, King & Fowler procured money from the defendant on the mortgage to it executed and delivered, and the money thereon received before the making of the second or renewal mortgage to the plaintiff, the execution and delivery of that mortgage could not affect the lien and right which the defendant acquired by its contract of the earlier date. So far as relates to the rejection or admission of this excluded testimony, the plaintiff below can rely only on its original mortgage. That instrument, bearing date March 25, 1898, by its express terms includes not only the sheep described, but the wool and fleece thereon when shorn. It provides that the same may be shorn by the mortgagors; that the wool may be marketed, with the consent of the mortgagee, given in writing; that the proceeds shall be applied to the indebtedness described in the mortgage; and that the mortgagee shall have the right to seize or recover the wool, or the proceeds thereof, for the purpose of applying the same upon the indebtedness and other purposes of the mortgage. These provisions of the mortgage it was competent for the parties thereto to annul or modify by parol agreement subsequently made, and the rule invoked by the objection that the testimony offered varied the terms of the written mortgages was not applicable as to the terms of the first mortgage. If we should assume, for the sake of the argument only, that the plaintiff's case was supported in any measure by what is termed in the record the "second mortgage" (that is, the second mortgage given the plaintiff, of date October 28, 1898), the written memorandum of the agreement previously made would be as incompetent to contradict or vary the terms of that mortgage as any parol testimony. And it would seem that an objection to parol evidence offered, that it was not competent to prove the agreement sought to be established, because it showed that a memorandum in writing of the agreement was made at the time, and the adverse party had not been notified to produce the written memorandum, must be without force, when it appears that the memorandum in writing, if produced and offered, would not

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be admissible, over objection, to alter the terms of the mortgage in question; both the writing and the parol proof of its contents being subject to the graver objection. The rule of evidence that, where the parties to a contract have reduced their agreement to writing, parol evidence shall not be received to alter or contradict the written terms, is familiar, and the reasons which support it elementary. 1 Greenl. Ev. §§ 275–286. It is often invoked in cases to which it is not applicable, and it is sometimes suggested, and acted upon in the moving progress of a trial before a jury, to conditions of offered testimony to which on first impression it appears to be applicable, and is therefore then enforced. It has doubtless been observed by those called to consider such matters that the first impression of good lawyers and of good judges seems to accept it as a universal rule that, where written evidence of a fact exists, all parol evidence of the same fact must be excluded. But such is not the rule. Keene v. Meade, 28 U. S. 1, 7 L. Ed. 581. The fact sought to be established in this case is the agreement of the plaintiff to allow the mortgagors to use the wool covered by the first mortgage to obtain means to meet the necessary expense of the management of the herds of sheep mortgaged to it. This the defendant offered to prove by the testimony of one of the acting parties, who, in stating the time and circumstances and terms of the agreement, referred, as a part of the res gestæ of that transaction, to a pencil memorandum made by the other acting party thereto, and read by the witness, which had for its purpose, as the witness claimed, the instructing of those who were to draft the renewal mortgage. This memorandum was wanting in essential elements of a written contract, and was so merged into the contract that thereafter was written as, in the absence of fraud or of other conditions not necessary here to name, lost any force it may ever have had to determine the rights and relations of the parties as fixed by the renewal mortgage. It did not, however, lose its force as a part of the res gestæ to support the parol testimony offered to evidence the agreement claimed to have been made in September, 1898,—the issuable fact in this case,—and, if the writing had been produced and offered for that purpose, would have been admissible. It does not follow that because it would have been admissible, and had been reduced to writing, its existence, production, and offer would exclude the other parol testimony relating to the same subject. It was not produced, and it is objected that its contents embrace not only the best but the only admissible evidence of the terms of the agreement to which it relates, and that oral testimony of its contents could not be given because notice had not been given to the adverse party to produce it. The excluded evidence tended to show that the written memorandum was not in the possession or control of the defendant; that when seen by the witness it was in the possession and control of the secretary of the plaintiff. The plaintiff had introduced that officer as a witness, and he had testified that no such memorandum ever existed. Numerous other witnesses had testified to their connection with the plaintiff and with these transactions, and that they had no knowledge of the existence of any such written memorandum. In this condition of the proof, granting that it was such a paper as

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ordinarily would require the giving of notice to produce it, as a condition precedent to offering parol testimony as to its contents, it is clear that the rule requiring such notice in proper cases has no application here. The testimony given by the plaintiff was by deposition of its different officers and employés, taken in ample time before the trial, and showing clearly it would be not only unnecessary but futile to require the giving of a more formal notice to the plaintiff to produce a paper which these incarnations of the corporation substantially concurred in swearing did not exist. "Evidence, when offered at the trial, must be assumed to exist, and to be true, for the purpose of determining the question of its admissibility." The pencil memorandum in question was not offered by the defendant, nor did the defendant offer to prove its contents to support or establish its defense; but it offered to prove a parol agreement made by the plaintiff with the mortgagors, King & Fowler, after the execution of the mortgage in contemplation of a renewal thereof, to the effect that the wool already shorn or to be shorn might be used to meet the expense of "running the sheep," and that the wool should not be included in the renewal mortgage, in connection with which testimony, and as a part of it, the witness referred to the fact that the representative of the plaintiff at the time of making this parol agreement made the pencil memorandum in question for the instruction and guidance of the parties at the plaintiff's office in Ft. Worth, where the renewal mortgage was to be made. The plaintiff cannot recover in this suit on the renewal mortgage, for the reasons already given. The defendant does not claim under either of the mortgages. Therefore the renewal mortgage and the pencil memorandum to which the testimony relates can only be considered as extrinsic evidence to support or contradict the other testimony offered to show that in September, 1898, the plaintiff had agreed that King & Fowler should use the wool shorn from the mortgaged sheep to meet the expense of "running the sheep." Whatever may be the sound construction of the renewal mortgage as to its giving, or not, a lien on the wool and fleece of the flocks, it is manifest that the language of that mortgage is not identical with the language of the first mortgage in relation to that subject. And while, if the action was on the second mortgage, its sound construction by the court might exclude any parol proof tending to modify its terms, when used—as it can only be used in this case—as extrinsic evidence to sustain or oppose the contention of the defendant, the inferences of fact to be deduced from the difference in its language and the language of the original mortgage are for the consideration of the jury. Barreda v. Silsbee, 62 U. S. 146, 16 L. Ed. 86. Also, whether any such pencil memorandum was ever written, and what, if written, it contained, presented a question of fact depending on the credibility of the witnesses; and that question of fact was for the consideration of the jury, and not for the determination of the court. Dunbar v. U. S., 156 U. S. 185, 15 Sup. Ct. 325, 39 L. Ed. 390.

We conclude that the trial court erred in rejecting the testimony of the witness King, and in directing a verdict for the defendant. Therefore the judgment of the circuit court is reversed, and the cause

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is remanded to that court, with direction to award the defendant a venire facias de novo.

SHELBY, Circuit Judge (dissenting). The record shows that the plaintiff in error offered to prove by Tom King that, at the time the arrangements were made for the extension of the loan and the execution of the second mortgage, he had an agreement with A. T. Atwater "that the wool should not be included in the second mortgage." The assignment of error is that the court erred in refusing to permit the witness to testify to an agreement "that the wool already shorn and to be shorn from the sheep should not be included in the second mortgage." The pleadings, the evidence, and the assignment of error seem to me to raise the plain question whether or not the negotiations preceding the execution of the second mortgage can be received in evidence to show that it should have been so written as to release certain property described in the first mortgage. It seems to me that this question should be answered in the negative, and that it would necessarily follow that the circuit court did not err in excluding the evidence. No principle of evidence is better settled than that, when persons put their contracts in writing, it is, in the absence of fraud, accident, or mistake, "conclusively presumed that the whole engagement and the extent and manner of their undertaking was reduced to writing." Bast v. Bank, 101 U. S. 93, 25 L. Ed. 794, 9 Notes U. S. Rep. 915; Lanes v. Squyres, 45 Tex. 382. I think the judgment should be affirmed.

(107 Fed. 662.)

ARLINGTON MFG. CO. v. NORWICH UNION FIRE INS. CO.

(Circuit Court of Appeals, Second Circuit. April 3, 1901.)

No. 118.

FIRE INSURANCE—ACTION FOR LOSS—MANUFACTURING PLANT—POLICIES—CONSTRUCTION—ADDITIONAL BUILDINGS—QUESTION FOR COURT.

Policies were issued by defendant on plaintiff's manufacturing plant, describing it by a plan referred to confining it to buildings designated thereon by specified numbers, and to the machinery, tools, and other articles mentioned as "contained in or attached" to these buildings. Privileges allowed "additions, alterations, and repairs," which the policy was to cover. *Held*, that the "additions, alterations, and repairs" referred to property described in the policies, which clearly excluded a separate building unconnected with the others specified therein and in course of erection at the time they were issued; and hence, in an action for its loss, the court properly refused to submit to the jury the question whether the policies were intended to cover additional buildings erected from time to time.

In Error to the Circuit Court of the United States for the Southern District of New York.

George Richards and John G. Carlisle, for plaintiff in error.

Wm. B. Ellison, for defendant in error.

Before WALLACE, Circuit Judge, and THOMAS, District Judge.

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WALLACE, Circuit Judge. The plaintiff in error was the plaintiff in the court below, and by its assignments of error impugns the rulings of the trial judge excluding evidence offered upon its behalf, and in not directing the jury to render a verdict in its favor for a part of the recovery sought in the action. The action was brought upon two policies issued by the defendant, dated, respectively, January 31, 1898, and February 1, 1898, and each insuring the plaintiff against loss by fire in the sum of $5,000 for the term of one year. The property insured by the policies was described therein as follows:

"On property known as the Arlington Manufacturing Co., manufacturers of pyraline, a substitute for celluloid goods, situate in Arlington, Hudson county, New Jersey. Plan on file with Ward Phillips, 56–58 Pine street, New York, to which all numbers of buildings refer."

"Buildings, Machinery, and Stock:

"On brick and frame buildings, sheds, additions, and attachments, marked Nos. 1 to 7, 9, and 11 to 16 (including smokestack), on plan; on fixed and movable machinery and machines of every description, and parts of same, engines, boilers, and connections, heating apparatus, fixtures, apparatus, office and factory furniture and fixtures of every description, safes, hose, automatic sprinkler equipment, dynamo, electric equipment, shafting, belting, pulleys, hangers, gearing, piping, pumps, hydraulic presses, tanks, dies, tools, implements of all kinds, patterns, utensils, and machinery supplies; on pyraline, manufactured, unmanufactured, and in process of manufacture, and materials of all kinds used in the manufacture of the same; and on all other property belonging to the business of the assured, their own, or held in trust or on commission, or sold but not delivered or removed,—all contained in or attached to the above-described buildings, sheds, and building marked No. 10 on the plan."

The policies also contained the usual co-insurance clause, and the following clause:

"Privileges:

"Privileged to use electric lights in the above-mentioned premises, to work nights when necessary, and to make additions, alterations, and repairs, and this policy to cover the same, and therein, and to use such materials and apparatus incidental to their business."

It appeared upon the trial that at the date when the policies were issued the plan on file with Ward Phillips showed the various buildings then comprising the manufacturing establishment of the plaintiff, being a group of 16 separate buildings, numbered on said plan from 1 to 16, respectively. When the policies were issued, the plaintiff had commenced the erection of another building, located some 30 or 40 feet to the east of the building designated on the plan as No. 11, upon a vacant lot, which the plaintiff had purchased in the preceding August. This new building was of brick, 145 by 84 feet in dimensions. It was completed in March, 1898, and the machinery from No. 11 was then removed into it, and it was thereafter occupied and used by the plaintiff as a part of its manufactory until the time of the fire. It was not physically attached to or connected with any of the other buildings. The new building was not shown on the Ward Phillips plan. April 30, 1898, it and its contents were damaged by fire; the loss on the building being $7,664, on the machinery therein $9,319, and on the stock $24,231.

It appeared in evidence that for many years the plaintiff had carried insurance upon the buildings and plant of its manufacturing

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concern with a large number of underwriters; that the different branches of its business were conducted in separate buildings; that new buildings were from time to time erected as the demands of the business required, and were used as part of the concern; that the plaintiff had obtained its insurance through two brokers, Ward Phillips and Mr. Van Valen; that the rate of premiums had been fixed by the Underwriters' Association of the Middle Department; that the defendant was a member of that association; that the Van Valen policies insuring the property were blanket policies, covering all the buildings and plant, without reference to any plan or specified description; and that the Ward Phillips policies were all in form like the two policies in suit.

The plaintiff offered to prove upon the trial that March 16, 1897, the Underwriters' Association fixed the rate of premiums for the insurance upon the buildings and plant, etc., of the plaintiff, specifying the rates upon the various buildings and their contents separately, and the rate upon the blanket policies, and on that date sent a notice to the defendant containing the rates; that in this notice there was a statement that it was understood that building No. 11 would be replaced by a brick building; that the premiums in the policies in suit were at the blanket rate specified in the notice; and that after the completion of the new building the Underwriters' Association examined it, and made no change in the premium rates of blanket policies. The trial judge excluded evidence of these facts, and the plaintiff duly excepted. At the close of the evidence the trial judge ruled that plaintiff was not entitled to recover for that part of the loss accruing from the damage by fire to the new brick building and its contents, and directed a verdict accordingly, and the plaintiff duly excepted, and asked to go to the jury upon the question whether it was not the intent of the parties that the insurance should cover additional buildings which should be erected from time to time.

We are of the opinion that the trial judge ruled correctly in excluding the evidence offered, and in directing a verdict as he did.

It did not appear that the defendant had ever issued any policy upon the property of the plaintiff prior to the first of the two in controversy, but, if this had been shown, together with the other facts proved or offered to be proven in evidence, inasmuch as by the policies in suit the parties had limited the risk to the buildings and property described therein, and there was no ambiguity in the description or other terms, it would not have altered the legal effect of the contract conclusively evidenced by the instruments. For the same reason it was quite immaterial that the other underwriters had issued policies which, read in the light of the surrounding circumstances, would have extended to cover the loss in controversy. Where the question is whether the property destroyed by fire is embraced within the terms of the policy, it is always competent, in contracts of doubtful interpretation, to give evidence of extraneous facts which will place the court in the situation of the parties when the contract was made, in order to enable it to be read understandingly; and in this view, if the action had been brought upon policies of the Van Valen form, the extraneous facts which were proved, or were offered

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to be proved, would have been of value in determining whether the insurance covered the new building as an addition, and, indeed, would have resolved such an inquiry quite conclusively in favor of the plaintiff. But the policies in suit were not expressed in any uncertain terms, and the property described as covered by the insurance was definitely and unmistakably pointed out by reference to the plan on file with Ward Phillips, and confined to the buildings designated on that plan by specified numbers, and to the machinery, tools, and other articles mentioned as "contained in or attached" to these buildings. The privilege to make "additions, alterations, and repairs" refers manifestly to the property which is described in the policy, and cannot be read as intending to permit the insurance to extend to them when made to other property. The meaning of the policy is emphasized, if that were possible, by the exclusion of the building "marked No. 10 on the plan" from the description of the property insured. The trial judge properly held that the construction of the policy was purely a matter of law, and that there was no question of fact for the jury.

The new building was in no sense an addition to No. 11, or to any of the property described in the policy. The evidence was that it was not physically connected with or attached to any part of that property, but was a separate and independent building; and no evidence was given tending to show that any of the machinery within it was connected with any of that used in the other buildings. A construction of the privilege clause which would extend its provisions to include such a building is wholly unwarranted upon principle or by precedent. Especially would such a construction be inadmissible when it appears that the new building was in process of erection at the date of the issue of the policies, the contract being plainly expressed to extend the insurance only to certain designated buildings and their contents. We have examined the authorities cited for the plaintiff in error, but none of them justify its contention, and it is unnecessary to discuss or to refer to them. The adjudication most nearly in point is Peoria Sugar-Refining Co. v. People's Fire Ins. Co. (C. C.) 24 Fed. 773, and that is adverse to the contention. In that case the new building was connected with the insured building by a bridge and an underground passage used for pipes, and was located about the same distance from the main factory as was the new building in the present case; but the court held that, being a new and separate building, it was "not an addition," and the insurance did not extend to it under a clause similar to that in the present policies.

The assignments of error are not well founded, and the judgment is affirmed.

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(107 Fed. 666.)

DUNN v. NEW YORK, N. H. & H. R. CO.

(Circuit Court of Appeals, Second Circuit. April 3, 1901.)

No. 112.

MASTER AND SERVANT—INJURIES TO BRAKEMAN—APPLIANCES—DUTY TO INSPECT—PRESUMPTION OF NEGLIGENCE.

A brakeman was set to work in switching with a road engine regularly used for that purpose, but unprovided with any special hand hold in front, necessary in his work. No particular projection was used, and the use of any particular one was not forbidden. The brakeman, however, used the figure plate, which was adapted thereto, and most convenient for a man of his size. It had been loose for 24 hours, but was apparently all right when he took hold of it. It gave way, however, and he was thrown under the cowcatcher and injured. *Held*, that the company owed him the duty of inspecting the plate commensurate with the purpose for which it must be assumed that it knew it was used, and hence, on proof of the foregoing facts, it was error to nonsuit him in an action for damages, enough being shown to require some proof of inspection to overcome the presumption of negligence.

In Error to the Circuit Court of the United States for the Eastern District of New York.

This cause comes here upon a writ of error to review a judgment dismissing the complaint upon the merits at the close of plaintiff's case. The action was brought to recover damages for injuries received while in the employ of defendant as a brakeman upon one of its trains at or near Union City, Conn. The plaintiff, at the time he was injured, was engaged in uncoupling freight cars from the forward end of an engine, which operation necessitated his pulling a pin with one hand, and with the other grasping some part of the locomotive to steady himself. He grasped the round plate fastened in the middle of the forward end of the boiler, and known as the "figure plate," on which are the figures indicating the number of the locomotive. Upon the occasion in question this plate was loose, so that it turned when the plaintiff applied pressure, and, support being thus suddenly and unexpectedly withdrawn, he was thrown under the pilot, or cowcatcher, of the engine, and received the injuries for which this action is brought. There was evidence in the case showing that, on the day before, the figures were turned so as to make it obvious that the plate itself had been turned. On the day of the accident, as plaintiff testifies, when he looked at the figure plate, the figures were all right; that is, in a horizontal position.

Before WALLACE and LACOMBE, Circuit Judges.

LACOMBE, Circuit Judge. The record contains no indication as to the grounds on which the plaintiff was nonsuited. The burden, of course, rested on the plaintiff to show a default on the part of defendant in respect of some of the duties imposed upon it. Plaintiff's contention is that there was a failure properly to inspect the figure plate. Plaintiff's evidence on that point was extremely slight, but was sufficient to require the defendant to show what sort of inspection, if any, it gave to the part in question. The evidence tended to show that it had been loose for 24 hours. Concededly, it was insufficient to support plaintiff on the day of the accident,—facts sufficient to put defendant to the proof of the methods it employed to guard against the occurrence of such an accident. When such proof is in, it may be apparent that, under all the circumstances,

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defendant acted as a reasonably prudent master would have done in looking after the safety of the place where and the appliances with which its servant was set to work; but, with no evidence to show that the figure plate had ever been inspected since it left the builder's shop, we do not think it can be said, as a matter of law, that no negligence was shown. The defendant, however, contends that it was under no obligation whatever to give the figure plate such an inspection as it would give to a hand hold, and from the attention given to this point in the briefs it may be inferred that it is the one on which the case turned below. The proof shows that the engine in question was a road engine, and not a yard or switch engine, and had none of the appliances customarily placed on the front and rear of engines engaged in switching, to facilitate the work of the men. There was not a single hand hold, hand grab, or grab iron upon or about the front of the engine. Nevertheless, the defendant employed the engine regularly in performing a considerable amount of switching work in a number of cities and yards where no switching engines were kept, and the engine was engaged in the general performance of this switching work when the accident happened. The way in which the work of the brakeman is performed when uncoupling a car from the locomotive is as follows: Standing on the right side of the engine, the left foot would be placed upon a step projecting from the bottom of the cowcatcher near the outside edge, and the right foot either upon the lower bar of the cowcatcher, to which the slats are fastened, or in the air-brake hose, which hung in front of some of the slats. Thus the body of the brakeman would be facing in a slanting direction towards the front of the engine, and his right shoulder would be pointing diagonally towards the center of the track. His back would be more towards the car than the engine. He would thus have to turn his body or his right arm towards the right, and back, in order to reach the pin in the drawhead, which projects out in front of the cowcatcher. From this description and an inspection of the photographs which were submitted on the argument, it is plainly manifest that the brakeman must take hold of something with his left hand, or he will almost inevitably lose his balance, and fall between the engine and the car. As has been seen, the defendant provided nothing devised specially to be held on to; nor did it, by any regulation, direct or forbid the men to use some particular part of the engine for that purpose. As was to be expected, therefore, the men used whatever they found convenient. Besides the figure plate, it appears from the evidence that use was sometimes made of the bull nose, an iron casting extending from the bumper beam to the drawhead. This, however, was about on a level with the waist, and for that reason unsatisfactory. The same is true of the slats of the engine, which are below the bumper. To grasp them the hand would get considerably lower than where the pin is being pulled. The lamp brackets on the side of the boiler a little above the level of the figure plate have been used, but they are further back, and so more inconvenient, unless a man is exceptionally tall. The same difficulty exists with regard to the iron sockets that were used for

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flags on the brace beam of the engine. It would be quite a long reach; impossible, indeed, for a man with no longer reach than the plaintiff. The braces supporting the boiler were conveniently located, but too hot to hold. Three witnesses, brakemen, were examined, besides the plaintiff. They were all taller men, and testified that, besides the figure plate, they used sometimes one, sometimes another, of these appliances for a hand hold. The plaintiff, however, finding it most convenient to his proportions, usually took hold of the figure plate. It appears, then, that the defendant set this engine to work switching, and put plaintiff to work on it at a place where defendant knew he must hold on to something. It provided no special hand hold; it directed no particular projection to be used as such; it forbade no such use; it maintained on its engine a figure plate, adapted for use as a hand hold, and so located that a man of plaintiff's size would find it the most convenient thing to take hold of. There was abundant evidence to support this last proposition; indeed, mere inspection of the photograph would seem to be sufficient to satisfy any intelligent mind that, if this engine were used for switching, its figure plate would most certainly be used for a hand hold. Knowing it would be so used, if for any reason it was difficult to maintain it firmly in position, or to inspect it, the defendant might have prohibited its use for that purpose. Not having done so, it owed a duty of inspection commensurate with the purpose which it must be assumed that defendant knew it was subserving. We are of the opinion, therefore, that it was error to take the case from the jury when plaintiff rested. There was enough proved to require some proof from defendant as to what inspection there was of the figure plate. The judgment is reversed, and cause remanded for new trial.

(107 Fed. 669.)

In re STEININGER MERCANTILE CO.

BAINBRIDGE STATE BANK et al. v. TONGE et al.

(Circuit Court of Appeals, Fifth Circuit. April 9, 1901.)

No. 927.

BANKRUPTCY—VOID PRIOR INCUMBRANCES—MORTGAGES TO HINDER CREDITORS.

A corporation executed mortgages covering all its property to favored creditors, who were not pressing it for payment nor asking to be secured, intending thereby to force indulgence from its other creditors and further advances from those secured. *Held*, that they were intended to hinder, delay, or defraud creditors, within Bankr. Act 1898, § 67, declaring void incumbrances made with such intent within four months prior to filing a petition in bankruptcy.

Appeal from the District Court of the United States for the Southern District of Georgia.

The main facts are as follows, substantially taken from appellants' brief: The Steininger Mercantile Company was a corporation engaged in the business of merchandising in the city of Bainbridge, Decatur county, Georgia, was of good financial standing, and had no mortgages or other liens whatever against

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them, and had the reputation of being solvent, and had recently enlarged its storehouse and increased its stock and insurance preparatory to doing a larger business. On November 29, 1898, Mr. R. A. Lytle, president of said corporation, finding said corporation temporarily embarrassed, sent for and consulted an attorney, Judge B. B. Bowers, of said city, stating to him that the corporation was perfectly solvent, and that, if it could get indulgence and collect up its assets, it could pay its creditors, but that it could not raise the ready cash to pay its maturing debts; that the assets of the corporation amounted to $61,780.91, and the debts to about $37,000, and that the cause of the embarrassment was the recent enlargement of its business, and the not having proceeded against its credit customers for payment as vigorously as it could have done, owing to the low price of cotton and the stringency of the times. Upon this statement said attorney advised him to execute mortgages to such of his creditors as would be likely to make him further advances, and to such others as might become apprehensive, and with their aid he might get indulgence from the other creditors, or further advances from those secured to pay off those that would not give indulgence, and thus continue to carry on the business, and ultimately pay off all of the creditors. Acting under this advice, the president of said corporation procured the said attorney to prepare said mortgages, which he did to the number of 39, taking the whole night therefor, and said mortgages were duly signed, executed, and filed for record in the clerk's office of the superior court of Decatur county early in the morning of November 30th, some by said president himself, and others by the mortgagees to whom the mortgages had been delivered; said mortgages covering the stock of goods owned by said corporation, and also embracing the notes and accounts and substantially all the property of the corporation. The debts amounted to about $37,000, and the assets to about $67,000, and the mortgages to $26,000, and the whole number of creditors was about 220, and the number who were tendered securities was 39, all of whom surrendered their mortgage security except these present 5 appellants. The said corporation also made and executed to its attorneys, B. B. Bowers and Donaldson & Hawes, a mortgage upon its assets to secure them for professional services to be rendered said corporation in the management of its business and tiding it over its present embarrassment, for which a note was given in the sum of $2,500, due one day after date, and dated November 30, 1898. All the mortgages executed in favor of the five appellants were conditioned for the payment of notes dated November 29, 1898, and due one day after date, and containing, among other provisions, one as follows: "It is stipulated that this note be placed with B. B. Bowers and A. L. Hawes for collection at ten per cent. on the whole of principal and interest as attorney's fees, all to be paid out of any principal and interest collected." At the time said mortgages were made and executed, the officers of said corporation did not expect or anticipate proceedings in bankruptcy, and the holders and owners of said mortgages in question did not know, at the time they accepted said mortgages, that the Steininger Mercantile Company was insolvent, or that said mortgages were made with the intent to prefer them, except such notice as arose from the mere fact of giving the mortgages without previous request, and the fact that many of the debts secured were not due, and the pay day was advanced, so that the mortgages could be foreclosed at once; and each one was notified separately that his mortgage was filed for record in the clerk's office for his acceptance, without explanation why the mortgages were given, and each of the appellees accepted his mortgage without any notice or knowledge that any other creditor had a mortgage. Neither Bowers nor Donaldson & Hawes represented any of said creditors secured by said mortgages until after the mortgages were accepted and recorded. The attorneys for the creditors opposing the mortgages are the attorneys for the trustees, the appellees in this case. On the afternoon of the 30th of November, after said mortgages were executed, delivered, and recorded as aforesaid, the five mortgagees, the appellants in this case, learning that other creditors of said corporation were endeavoring to procure bond in order to sue out attachments against said corporation, proceeded to foreclose their mortgages, have executions issued from said foreclosure, and the sheriff to take charge of the goods. After said stock of goods was foreclosed on by these appellants, the unsecured creditors,

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together with the balance of the mortgage creditors who had surrendered their mortgage liens, filed a petition to declare the Steininger Mercantile Company an involuntary bankrupt, based upon the act of bankruptcy of making and executing these mortgages; alleging, under oath, that the Steininger Mercantile Company did make and execute these mortgages, intending them for illegal preferences, and also alleging that the mortgages constituted an assignment to creditors, and in either event were void. The district court sanctioned the petition, enjoined the sheriff from selling under the foreclosures, and placed the stock of goods, notes, and accounts and all other property of the Steininger Mercantile Company in the hand of a receiver, who sold the goods for $9,500 cash, and went forward collecting up the assets of the Steininger Mercantile Company, who resisted the proceedings to the best of its ability, especially the allegations of insolvency and illegal preferences. On the 10th day of January, 1899, the district court adjudged the Steininger Mercantile Company an involuntary bankrupt, on the ground of it making and executing the mortgages. The said corporation having been adjudged a bankrupt, the matter was referred to one of the referees in bankruptcy of said court to take such further steps as are required by the bankruptcy law, which said referee called a meeting of the creditors of said corporation for the purpose of proving their respective claims. At the time of the meeting of the creditors these appellants offered to prove their said claims as correct claims under the provisions of the bankrupt law, which was objected to by the creditors who now are the appellees in this case, represented by the trustee in bankruptcy, and the said objections constitute a part of the record of this case. Upon the proposition to prove said claims and the objections filed as aforesaid, the referee heard the testimony of both sides upon the issue made by said objections filed, and the referee, upon considering said evidence, rendered his judgment against these mortgagees, present appellants, to which judgment appellants excepted and filed their petition for review. On May 3, 1899, said petition for review came on to be heard in said district court, when, in lieu of the hearing of the same, counsel for both sides entered into an agreement by which the judgment of the referee, and all proceedings before the referee, as well as the proceedings for review, were set aside without prejudice to either side, and the whole matter was referred to the referee to take testimony, either party having the privilege to introduce any or all of the testimony contained in the petition for review, to be passed upon by the court as to its admissibility and competency. Under said agreement on May 3, 1899, appellants filed their petition showing that in accordance with the order of the court the goods had been sold by the referee, and the sum of $9,500 realized from the same, and prayed that the said sum be paid over to them on their said mortgages, or so much thereof as was necessary to extinguish the same, to which petition W. G. D. Tonge, trustee in bankruptcy, in behalf of the unsecured creditors, and in behalf of those that had surrendered their liens, filed his answer, making exactly the same objections and raising the same issues as were made in the first proceeding before said referee. On the 21st day of June, 1899, the referee, under the agreement and order of the court aforesaid, commenced taking testimony, which testimony appears in the present record. On the 10th day of January, 1900, this case upon the petition and evidence, as certified by the referee, came on to be heard in the said district court, and no part of the evidence was ruled out as incompetent or inadmissible, and no motion was made to rule out any part of the same. The court, after hearing and considering the whole of the evidence taken and certified by the referee, and the argument in said case, decided against appellants, and decreed: "(1) That each and every one of said so-called mortgages held by petitioners, and set up in said petition, are declared to be illegal preferences, null and void as liens, and are hereby set aside. (2) That the prayer of said petitioners, that the fund in the hands of the trustee, resulting from the sale of assets of Steininger Mercantile Company, should be paid to the account of the alleged liens they hold, is refused and denied. (3) It is further ordered and decreed that said trustee now proceed to distribute the said fund to the general creditors, in regular course, so soon as the court shall have fixed the amount of allowances and expenses to be deducted therefrom. (4) It is further ordered that all the costs and expenses of this special

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proceeding shall be paid by the said petitioners. Compensation is hereby allowed to John D. Harrell, Esquire, special master, for his services in taking the testimony in this proceeding, to wit, the sum of ——— dollars, to which must be added the expenses paid out by the trustee, under previous order of the court, for stenographic services in the matter of taking said testimony, amounting to the sum of ——— dollars." This appeal is prosecuted to reverse said decree, and some 17 assignments of error, with many divisions and subdivisions, are presented, suggesting in every way specific errors of the trial judge; the whole amounting to the proposition that the appellants' mortgages were legal and valid, and should be fully recognized.

John I. Hall, Olin J. Wimberley, and B. B. Bowers, for appellants.
William Gerrard, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts as above). No appeal was taken from the decree adjudging the Steininger Mercantile Company bankrupt, and enjoining the sheriff from selling, under the foreclosure decrees, the property of the Steininger Mercantile Company, and appointing a receiver to take possession of and sell the property of said company, so that there is no question in this case but that the Steininger Mercantile Company committed an act of bankruptcy and was properly adjudged a bankrupt. The appellants are before the court insisting upon a mortgage lien on the property of the bankrupt. Section 67 of the bankrupt law of 1898 is, in part, as follows:

"That all conveyances, transfers, assignments, or incumbrances of his property or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors."

The question then presented is whether or not the Steininger Mercantile Company, in executing the mortgages to appellants, intended thereby to hinder, delay, or defraud creditors of said company. As the facts in this case show that the officers of the said company sent for counsel, who sat up all night executing mortgages in favor of favored creditors who were not pressing for payment nor asking for a mortgage, and the said mortgages so executed covered all the property of the mortgagors, and are conceded to have been with the intent that the debtors might thereby force indulgence from their creditors and further advances from those secured, this court is satisfied that the mortgages were executed with the intent to hinder, delay, or defraud some of the creditors of the company; and as this was the conclusion of the learned judge of the court below, and is made effective in the decree appealed from, the same is affirmed.

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(107 Fed. 673.)

BLUMBERG v. BRYAN.

(Circuit Court of Appeals, Fifth Circuit. April 9, 1901.)

No. 1,015.

BANKRUPTCY—WIFE AS ADVERSE CLAIMANT.

In Alabama the bankrupt's wife may be an adverse claimant, within Bankr. Law 1898, § 23; Code Ala. § 2526, giving the wife full legal capacity to contract as if sole, except as otherwise provided, and the position that a wife may claim property adversely to her husband being supported by sections 2520–2537, and there being no statute qualifying her right to be an adverse claimant.

Petition for Revision of Proceedings of the District Court of the United States for the Middle District of Alabama.

Tennent Lomax and B. P. Crum, for petitioner.

George F. Moore, for respondent.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. Section 2526 of the Code of Alabama now in force provides, touching the wife's power to contract, that "the wife has full legal capacity to contract as if she were sole, except as otherwise provided by law." In that state a husband and wife may contract with each other, subject to the rules of law as to contracts by and between persons standing in confidential relations; but the wife shall not, directly or indirectly, become the surety for the husband. The whole scope of chapter 60, embracing sections 2520–2537 of the Code of Alabama, support the position that in that state the wife may claim property adversely to her husband, and we find no provision of statute law in force there which qualifies her legal capacity to be an adverse claimant, within the meaning of those terms as used in section 23 of the national bankrupt law. Therefore, on the authority of our decision in Re Abraham, 35 C. C. A. 592, 93 Fed. 767, it is ordered and decreed that the order of the court of bankruptcy entered in this cause on August 3, 1900, in so far as the same in any way affects the petitioner, E. Blumberg; and the order made by H. Booth, referee in bankruptcy for the Middle district of Alabama, dated October 19, 1900; and the order made by the Honorable John Bruce on the 6th day of November, 1900,—be, and the same are each and all hereby, reversed, set aside, and annulled, and the cause is remanded to the district court, sitting in bankruptcy, with instructions to dismiss the petition of T. L. Bryan, filed in the district court of the United States for the Middle district of Alabama, in the matter of H. Blumberg, bankrupt, on August 3, 1900, so far as the same in any way affects E. Blumberg, the wife of H. Blumberg, bankrupt, and to vacate all orders made thereon, and to restore to the said E. Blumberg the goods and properties taken from her possession, and allow her reasonable costs, in accordance with our views as expressed in our opinion in Re Abraham, supra, and let her have judgment for the same.

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(107 Fed. 677.)

In re LORILLARD et al.

(Circuit Court of Appeals, Second Circuit. April 3, 1901.)

No. 137.

1. LIMITATION OF ACTIONS—ACKNOWLEDGMENT IN WRITING—SUFFICIENCY.
A debtor, in writing to his creditors, wrote of "my indebtedness to you," asked for a statement of what he "now" owed, "estimated" his indebtedness to one of them at more than it really was, and asked for statements from them of their figures, that he might compare with his own. There was nothing in his letters to "repel the presumption" of a promise to pay what he admitted he owed, and nothing inconsistent with such an inference from his admission. *Held* sufficient acknowledgment in writing, within Code Civ. Proc. N. Y. § 395, to take the debts in question out of the operation of the statute.

2. BANKRUPTCY—OBJECTION TO CLAIMS—PREVIOUS PAYMENT.
A debtor, prior to his bankruptcy, had deeded to a trustee a bond and second mortgage on corporate property to secure advances made, and to be made, by two of his creditors. Thereafter a receiver was appointed for the corporation, and a plan of reorganization proposed. It did not provide that the two creditors referred to should release their claims against the bankrupt, but did so provide as to others, and contemplated foreclosure of the first mortgage. The second mortgage was foreclosed, and the corporate property bought in by the counsel who conducted the foreclosure. The title was then transferred by him to a new company, in return for common stock therein, which he transferred to the trustee before referred to, by whom it was distributed to various parties, the two creditors each receiving some. *Held*, on a claim that they were paid, that conceding that the plan was carried out, and that they had released their claims against the old company on receiving such stock, they still subsisted in full against the bankrupt, the stock merely taking the place of their former collateral security, and, being worthless, did not reduce the amount of their claims against him.

Appeal from the District Court of the United States for the Southern District of New York.

This cause comes here upon appeal from an order of the district court, Southern district of New York, allowing two claims against the bankrupt, one of Peter Lorillard for $285,725.91, and the other of Henry I. Barbey for $299,603.51. Both include interest. Objection to such allowance was made by several of the other creditors, some of whom have appealed.

A. B. Cruikshank, for appellant Eleventh Ward Bank.
Lewis S. Haslam, for appellant Gallatin Bank.
Charles E. Hughes, for appellees.

Before LACOMBE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. Two objections are urged to the allowance of these claims,—(a) that they were outlawed at the time petition in bankruptcy was filed, and (b) that they had been paid some years before.

Peter Lorillard is the brother, Barbey the brother-in-law, of the bankrupt. Their claims are for money loaned him upon his promissory notes. The latest due date of any note held by either is more

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than six years prior to the filing of petition in bankruptcy. Both claims would be barred by the statute unless there has been some acknowledgment or promise in writing, signed by the debtor, within the six years. The claimants rely on the following correspondence:

"New York, 16 March, 1900.

"My Dear Barbey: I would like to get from you a statement of my indebtedness to you. According to Seidler's account, I now owe you $215,000, exclusive of interest, but my memoranda is for $225,000. Please let me know your figures.

"Yours, truly, Jacob Lorillard.

"To Henry I. Barbey, Esq."

"New York, March 19, 1900.

"My Dear Barbey: Thanks for your statement of my indebtedness to you of $191,198.53 in 1891. I will go over my accounts, as had estimated it more than this, and Pierre's at less than he makes, but have great confidence in the correctness of your accounts, as mine are memoranda.

"Yours, truly, J. Lorillard.

"To Henry I. Barbey, Esq."

"New York, March 16, 1900.

"My Dear Pierre: I would like to get from you a statement of my indebtedness to you. Seidler's statement is that I now owe you $207,955.70, exclusive of interest. Please let me know your figures.

"Yours, truly, Jacob Lorillard.

"To Pierre Lorillard, Esq."

"March 17, 1900.

"C. D. Finlay, Esq.—Dear Sir: I write to you, as the representative of my brother Pierre, to request that you send me a statement of my present indebtedness to him. According to Seidler's statement, I now owe my brother Pierre, for advances made by him to me some years ago, two hundred and seven thousand nine hundred and fifty-five $^{70}/_{100}$ dollars, and interest. Please give me a detailed statement of the figures, as you have them.

"Yours, truly, Jacob Lorillard."

What written statement will be sufficient to take a case out of the operation of the statute of limitations is regulated by the provisions of the New York Code of Civil Procedure. Discussions of the general subject, found in the opinions of the federal courts and of courts of other states, are therefore unpersuasive. The statute of New York, as interpreted by the New York courts, is controlling. The Code contains the following provision:

"Sec. 395. Acknowledgment or new promise must be in writing. An acknowledgment or promise, contained in a writing, signed by the party to be charged thereby, is the only competent evidence of a new or continuing contract, whereby to take a case out of the operation of this title. But this section does not alter the effect of a payment of principal or interest."

It will be observed that the statute does not require an express written promise to pay. A written acknowledgment of the indebtedness is sufficient, if such acknowledgment is explict and unqualified. The courts have held that where the acknowledgment is qualified, as with a denial of the equity or legality of the demand, or an assertion of poverty and inability to pay, or in any other way so as to "repel the presumption of a promise to pay," it is not sufficient. Hancock v. Bliss, 7 Wend. 267; Deyo's Ex'rs v. Jones' Ex'rs, 19 Wend. 491; Allen v. Webster, 15 Wend. 284; Bloodgood v. Bruen, 8 N. Y. 362; Insurance Co. v. Brett, 44 Barb. 489.

If, however, there be an unqualified acknowledgment that there

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is an existing present indebtedness, and such acknowledgment be not coupled with any suggestion of compromise, or postponement, or anything inconsistent with the inference which naturally follows from such acknowledgment, it is sufficient. "A bare or mere acknowledgment of the existence of the debt is sufficient, as the law will imply or infer from its existence a promise to pay it." Henry v. Root, 33 N. Y. 530. An unconditional acknowledgment raises the inference of a promise to pay. Stevens v. Seibold, 5 N. Y. St. Rep. 261. "It seems to be the general doctrine that the writing, in order to constitute an acknowledgment, must recognize an existing debt, and that it should contain nothing inconsistent with an intention on the part of the debtor to pay it." Manchester v. Braedner, 107 N. Y. 349, 14 N. E. 405; Cudd v. Jones, 63 Hun, 144, 17 N. Y. Supp. 582; McNamee v. Tenny, 41 Barb. 495; Fiske v. Hibbard, 45 N. Y. Super. Ct. 331; Wright v. Parmenter, 23 Misc. Rep. 629, 52 N. Y. Supp. 99.

The acknowledgment of a present indebtedness to both Lorillard and Barbey in the case at bar is manifestly entirely unqualified. The debtor writes of "my indebtedness to you"; asks for a statement of what he "now" owes; "estimates" his indebtedness to one party at more than it really is; and asks for statements from his creditors of their figures, that he may compare with his own. There is nothing in the letters to "repel the presumption" of a promise to pay what he admits he owes; nothing inconsistent with such an inference from his admission. Under the authorities in this state, had the creditors on March 21, 1900, brought suit against Jacob Lorillard in the state court to recover this indebtedness, the statute of limitations would not operate as a bar to their recovery.

It is further contended that these claims "were paid off and extinguished by the reorganization proceedings under which the New York & New Jersey Fireproofing Company was organized." The facts upon which this contention is founded are as follows: Prior to 1888 the bankrupt was carrying on the business of brick making at Keyport, N. J. On September 15, 1888, he incorporated the Lorillard Brick-Works Company, to which he turned over the plant and business, taking its stock therefor. On October 1, 1888, a so-called "first mortgage" of $335,000 was executed by this corporation to Gouverneur Tillotson, as trustee, to secure bonds for that amount. This was really a second mortgage on some of the property, because there was a small purchase-money mortgage for $12,000 outstanding, which may be disregarded here. Subsequently, and prior to September 2, 1890, the same corporation executed a mortgage (which may be called the "second mortgage") to Jacob Lorillard himself, for $265,000, to secure a bond of the corporation to him, conditioned for the payment of said sum of $265,000 on demand, with interest. On September 2, 1890, he assigned this bond and mortgage to Tillotson in trust to secure, inter alia, the advances which Peter Lorillard and Barbey had already made to him on his notes, and as indorsers and guarantors, and also further advances to be made to the extent of $91,390. The text of the deed of trust is:

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"In order to secure to said parties the payment of such advances past and prospective, and to save them from loss by reason of such indorsements and guaranties, the said Jacob Lorillard has assigned said bond and mortgage to the party of the second part, as trustee for the benefit of said parties, as interest may appear, and under the trust hereinafter declared."

The deed provided that, upon a certain written request by parties representing a majority of the indebtedness, the trustee should forthwith proceed to foreclose the mortgage, dividing proceeds of sale after expenses ratably among the parties, and paying over the surplus, if any, to Jacob Lorillard. On December 13, 1890, Charles Seidler was appointed receiver of the Lorillard Brick-Works Company, and continued to administer the property for several years. Subsequently, apparently in 1893, it was proposed to reorganize, and a circular was issued, which set forth the following proposed plan: First. Issue of $150,000 first-mortgage bonds to pay off receiver's certificates and for working capital. Second. Issue of preferred stock in the new corporation in place of the first-mortgage bonds of the Lorillard Brick-Works Company, amounting to $335,000. Third. "That the holders of the second mortgage consent to allow the reorganization to proceed without delay, and to accept for their claims, principal and interest, the common stock of the company at par." Fourth. "That the unsecured creditors shall release their claims against the old company and the real estate of the same in the hands of the receiver, and their claims individually against Jacob Lorillard, and receive common stock in the new company at par for their claims, principal and interest."

The record does not show whether this proposed plan was ever signed by anybody, or whether bonds, stocks, and proofs of claims were deposited under it. Instead of proceedings being instituted under the first mortgage, as the plan contemplated, the parties secured by the second mortgage merely "allowing the reorganization to proceed," they became themselves the actors. Foreclosure proceedings were begun under the second mortgage in 1893, decree of sale duly entered, and the property of the old company sold October 14, 1894, for $1,000, to William Brinckerhoff, the counsel who conducted the foreclosure suit, and who subsequently conveyed the property to the New York & New Jersey Fireproofing Company, the new corporation. The preferred stock of the new company ($335,000) was taken by the bondholders, who were secured by the first mortgage. The common stock appears to have been issued to Mr. Brinckerhoff originally in payment for the title, and by him was transferred to Mr. Tillotson, through whom it was distributed to various parties. Mr. Barbey received some, apparently Mr. Peter Lorillard received some, and other parties to this proceeding, such as the Eleventh Ward Bank, also received a portion.

There is contention between appellants and appellees as to whether the purchase of the property by Brinckerhoff was in the interest of the plaintiffs in the foreclosure or in the interest of all creditors who had been invited to enter into the plan of reorganization; also whether or not such plan was actually carried out; and whether under it the holders of old claims against the old company who took common stock in the new were compelled to release their old claims,

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or bound by some obligation of good faith so to do. The referee held that "whatever may have been the plan or purpose expressed in the printed reorganization circular, or whatever may have been the wishes of the committee of creditors appointed to carry out the reorganization, as a matter of fact none of the other creditors, excepting the bondholders, were obliged to relinquish their claims upon receipt of the stock of the new company." The district judge sustained the referee, and the appellants strenuously insist that this is error. But we do not find it necessary to go at any length into a discussion of this branch of the case, in view of the fact that it is not disputed that the common stock of the new corporation is valueless. Even if it were conceded that all the proceedings under which the property was sold were conducted in order to carry out the proposed plan, and that all parties are bound by its terms, it is difficult to understand upon what theory it can be contended that Jacob Lorillard's debts to his brother and to Barbey were thereby paid or released. Under the plan the unsecured creditors expressly agreed to take common stock, not only for their claims against the old company, but also for their claims against Jacob Lorillard individually, and to "release" both sets of claims. But there is no such provision in the paragraph referring to the holders of the second mortgage. It is their claims under that instrument for which they are to "accept" common stock (there is no provision as to any release). What were those claims? The right to payment of a bond for $265,000, whereby the old company was obligated to pay that sum on demand to Jacob Lorillard or his assigns, and the further right to sell out the property, if demand failed to bring the money. But if those rights were both extinguished, parted with, released, abandoned, it would make no difference, so far as the claims against the bankrupt are concerned. The bond and mortgage were only collateral security for his individual debts held by certain of his creditors, and if common stock of the new company has taken the place of, or ought to take the place of, the old second mortgage, then such common stock will itself be the substituted collateral. If it were worth anything, there might be some question as to whether the amount of the claims is correctly found by the referee; but, since it is valueless, there is no theory upon which the conclusion of the district court could be reversed. The order appealed from is affirmed.

(107 Fed. 687.)

GREMPLER v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. March 12, 1901.)

No. 2,910.

CUSTOMS DUTIES—CLASSIFICATION—COMPOSITION METAL.

Composition metal of which copper is the component material of chief value, in sheets which require to be reworked before the metal is available for use, is not dutiable under paragraph 177 of the tariff act of 1894, as a partly manufactured article composed wholly or in part of any metal, but is entitled to free entry under paragraph 452.

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Appeal from the Circuit Court of the United States for the Southern District of New York.

Appeal by the United States from a decision of the circuit court reversing the decision of the board of general appraisers as to the classification for duty of certain imported merchandise.

The following is the opinion of the circuit court (TOWNSEND, District Judge):

The merchandise in question consists of composition metal, of which copper is the component material of chief value, and which is imported in large sheets. It was assessed for duty as a "manufactured article, not specially provided for, composed wholly or in part of any metal, and whether partly or wholly manufactured, thirty-five per centum ad valorem," under the provisions of paragraph 177 of the act of 1894, and was claimed to be free under paragraph 452 of said act, as a "composition metal of which copper is a component material of chief value, not specially provided for." It is contended that this merchandise is partly manufactured, because it has been thus made into sheets. This contention is met by proof that these sheets are not available for any purpose until after they have been beaten to one-sixth their present thickness, and then cut into pieces and put into books to be sold, apparently for use in gilding. The invoice consists of kupfermetall, buchmetall, and clippings. It appears that the kupfermetall is all copper, and therefore it is not included under the provisions for composition metal. As to the buchmetall and clippings, I think the question has been disposed of favorably to the contention of the importer by Judge Wheeler in Benedix v. U. S. (C. C.) 99 Fed. 258, where an article practically identical with this here in question was before him upon a similar contention. The decision of the board of general appraisers is affirmed as to the kupfermetall, and reversed as to the buchmetall and clippings.

D. Frank Lloyd, Asst. U. S. Atty.

Albert Comstock, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. Decision of circuit court affirmed on opinion below.

(107 Fed. 688.)

COCA et al. v. MORRIS et al.

(Circuit Court of Appeals, Seventh Circuit. April 15, 1901.)

No. 705.

EXPORTERS—DELAY IN TRANSMISSION OF GOODS—LIABILITY—INCREASED CUSTOMS DUTIES.

Pending the passage of the Wilson tariff bill of 1894, defendant filled an order for lard at Chicago to be shipped to plaintiffs in Cuba, the goods to be delivered to the purchasers at the point of shipment, but delay, for which the defendants were in no way responsible, occurred in forwarding a part of it by vessel from New Orleans, and before it reached Havana plaintiffs had to pay duties imposed thereon by the Spanish government in retaliation for the passage of the Wilson bill, and which, but for the delay, would not have been collected. *Held*, that the risk of such a result was taken by plaintiffs, and they could not claim reimbursement from defendants therefor.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

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This is an action by plaintiffs below, citizens of Cuba, against the defendants, citizens of Chicago, doing business at Chicago as manufacturers and dealers in lard under the firm name of Nelson Morris & Co., to recover the sum of $3,635.87 damages, being the amount of custom duties which the plaintiffs below allege that they had to pay over and above what, but for the alleged negligence of the defendants, they would have been required to pay, at Havana, upon 268 tierces of lard shipped by the defendants below to them in August, 1894. The ground of the action is the alleged negligence of Nelson Morris & Co. in not shipping the goods to reach Havana, Cuba, before the Spanish government had increased the import duties upon lard in retaliation of an act of congress known as the "Wilson Tariff Bill," which at about that time had become a law in the United States. A jury being duly waived by the parties, the action was tried before the court without a jury, and the facts in the case as they appear from the record are found and fully stated by the court in its findings in the case as follows:

"(1) That the defendants, as Nelson Morris & Co., sold to the plaintiffs, as Coca & Co., four hundred tierces of lard, which contract of sale is evidenced solely by correspondence passing between the parties; that the first order was given by Coca & Co. by cablegram on August 7, 1894, being for 200 tierces, and the second order was given in a like manner for 200 tierces on August 11, 1894; that said contract of sale was made for shipment 'C. I. & F. Havana, prompt shipment from Chicago.'

"(2) That said lard so ordered by Coca & Co. was of a special character and brand, which Coca & Co. then knew was not carried in stock by Nelson Morris & Co., but must be manufactured and made ready for shipment after receipt of the order; and that it required from eight to ten days after the order was received for these brands of lard before the same could be made ready for shipment.

"(3) That Nelson Morris & Co., immediately upon receipt of said respective orders, proceeded to manufacture said lard, and prepare same for shipment, with all reasonable promptness and dispatch, and that said lard was thereafter shipped as follows: 200 tierces on August 17, and 200 tierces on August 18, 1894.

"(4) That on August 11, 1894, and prior to the receipt by Nelson Morris & Co. of the order for said second 200 tierces of lard, Nelson Morris & Co. reserved space and transportation through the regular representative in Chicago of the Southern Pacific Company for said first 200 tierces of lard to be shipped to the plaintiffs at Havana, Cuba, over the Illinois Central Railroad, to New Orleans, Louisiana, and thence to Havana, Cuba, by the steamer of said Southern Pacific Company scheduled to sail from New Orleans August 23, 1894, at 8 o'clock a. m., which said steamer was the first available steamer by which said lard could be shipped to Havana, Cuba; that thereafter, between August 13 and August 16, 1894, Nelson Morris & Co. in a like manner reserved space and transportation for the second 200 tierces of said lard to be shipped in the same manner and on the same steamer to Havana, Cuba; that said route was the quickest route by which said shipment could be made after receipt of said orders.

"(5) That Nelson Morris & Co., pursuant with their arrangement made with said Southern Pacific Company, delivered said lard in the shipment thereof to the Illinois Central Railroad Company in Chicago, Illinois, with all freight and insurance prepaid, and billed the same through to Havana, Cuba, by way of the steamer of said Southern Pacific Company from New Orleans, Louisiana, and received from said Illinois Central Railroad Company bills of lading showing said lard to be consigned to 'Morris & Co., notify Coca & Co., Havana, Cuba, care of Morgan Steamship Line from New Orleans'; and that thereupon Nelson Morris & Co., through arrangement previously made with Coca & Co., issued a sight draft upon Coca & Co. to Mueller, Schall & Co., who were the New York bankers and agents of Coca & Co., for the purchase price of said lard, and attached to said draft said bills of lading indorsed in blank by said Nelson Morris & Co. to be delivered to said Coca & Co. upon payment of said draft; that said draft was thereafter paid by said Mueller, Schall & Co., and said bills of lading, indorsed as aforesaid, delivered to said Mueller, Schall & Co. on August 20, 1894.

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"(6) That said Illinois Central Railroad Company and said Southern Pacific Company were at said time common carriers, and that Nelson Morris & Co. furnished to said Illinois Central Railroad Company, on August 17 and 18, 1894, and to said Southern Pacific Company on August 20, 1894, by telegram and letter, full shipping instructions and all necessary information in detail in ample time for the proper billing of said lard, and for obtaining all necessary certificates for the shipment of said lard by said steamer, scheduled to sail on August 23, 1894.

"(7) That the scheduled time for the trains of said Illinois Central Railroad Company, upon which said lard was shipped from Chicago to New Orleans, was at said time 55 hours; that two cars of said lard, containing 133 tierces, arrived at New Orleans on August 20, at 6:50 o'clock a. m., and were delivered to the Southern Pacific Company at 8:20 a. m., August 21, 1894; that three cars of said lard arrived at New Orleans on August 21, 1894, at 8:15 o'clock a. m., and were placed by the Illinois Central Railroad Company on the Southern Pacific Company's tracks, and tendered to the Southern Pacific Company at 8:40 o'clock a. m. on the same day; that the remaining one car arrived at New Orleans at 11:30 o'clock p. m., August 21, 1894, and was not tendered by the Illinois Central Railroad Company to the Southern Pacific Company because said Southern Pacific Company refused to accept the three cars last tendered.

"(8) That said Southern Pacific Company sent the steamer scheduled to leave on August 23d forward direct to Havana at 1:50 p. m. on August 22d, instead of at the time it was scheduled to sail; that said 400 tierces of lard arrived at New Orleans in ample time to have been loaded upon said steamer prior to the time of its sailing on August 24, 1894; that Nelson Morris & Co. had no notice that said steamer would or might sail before its scheduled time; that it was not the custom of said Southern Pacific Company to send its steamers forward ahead of scheduled time, unless all freight contracted for had been put on board.

"(9) That said Southern Pacific Company, without the fault of Nelson Morris & Co. in any respect, refused to receive on board said steamer 268 tierces of said lard, and that there was no other means by which said lard could have been shipped to Havana prior to September 1, 1894.

"(10) That the remaining 268 tierces of said lard went forward to Havana on the next steamer of said Southern Pacific Company, which sailed on September 1, 1894, except one tierce thereof, which was not sent forward until a later steamer, and that by reason of the failure of said carriers to forward said lard on said steamer which sailed on August 22, 1894, Coca & Co. were required to pay to the Spanish government, through its custom-house officers at Havana, the sum of $3,635.87 as custom duties upon said 268 tierces of lard, which duties said Coca & Co. would not have been required to pay had said lard gone forward on said steamer which sailed on August 22, 1894.

"(11) That on August 15, 1894, the United States congress passed a bill known as the 'Wilson Tariff Act,' and that thereupon said bill went into the hands of the president of the United States for its approval; that the president of the United States did not approve said bill, but the same became a law without his approval on August 27, 1894; that the Spanish government thereupon, as a retaliatory measure, placed duties on certain American products, including lard; and that the duties paid upon the 268 tierces of lard in question by Coca & Co. were the result of the Spanish duties imposed as aforesaid.

"(12) That the contract of sale of the lard in question was not made in contemplation of any change in Spanish duties upon American products, and that the parties to said contract were not informed of any possible change in said tariff schedules until after the lard in question had been shipped by Nelson Morris & Co. and had arrived at New Orleans; that none of the correspondence by which the sale of said lard was consummated contained any reference to or mention of possible tariff changes, either in the United States or Cuba.

"(13) That the term 'C. I. & F. Havana,' used in said contract, was one of recognized meaning in that trade, namely, that the price quoted includes the cost of the merchandise, marine insurance, and freight charges to Havana,

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Cuba; and that the term 'Havana,' as a part of said phrase, is merely descriptive of what freight and insurance is to be prepaid; that such contract, according to the custom of export shippers in Chicago, means that the goods are to be delivered to the purchaser at the point from which shipment is made."

And as conclusions of law thereupon the court found that the defendants, Nelson Morris & Co., were not in any manner liable or responsible for the failure of said goods to arrive in Havana prior to the change of the Spanish tariff schedules, and that the defendants, Nelson Morris & Co., were not liable for any damages or losses sustained by the plaintiffs on account of said tariff changes.

Otto Gresham, for plaintiff in error.

Augustus Binswanger, for defendant in error.

Before WOODS and GROSSCUP, Circuit Judges, and BUNN, District Judge.

Upon the foregoing statement of facts BUNN, District Judge, delivered the opinion of the court.

The facts in this case are found by the court below, and cannot be reviewed here. The record shows very little conflict in the testimony, which fully supports the findings of the court. We think also that the conclusions of law are also fully sustained by the findings of fact, and that there is no error in the record for which the judgment can be reversed. The defendants in error did all they could to manufacture and ship the lard as soon as was possible, and by the first proper conveyance, and are not responsible for their not reaching Havana before some conceivable new tariff law might be enacted by the Spanish government in retaliation of a high tariff law passed by our congress. There is no evidence on the subject, and it is hardly possible that such a ground of damages could have entered into the contemplation of the parties when the contract was entered into. The Wilson tariff act, levying somewhat higher duties upon sugar and some other products imported from Cuba into the United States, was passed by both houses of congress, after a joint conference, on August 15, 1894. On the same day Nelson Morris & Co. shipped 200 tierces of lard, the second shipment being on the following day. The bill went to the president, and was retained by him without either signing, vetoing, or returning it to congress until August 27th, when it became a law by force of the constitutional provision provided for such cases. In the meantime the goods had passed beyond control of the defendants, and were on their way to Havana, but did not, all of them, reach there until after the duties on lard had been raised by the action of the Spanish authorities. The goods being en route at the time the Spanish law was passed, the presumption would be that the new rates would not apply; but, however that might be, it seems clear that no such consequence could have reasonably entered into the minds of the parties when the order for shipment was made. The goods were shipped from Chicago on the 17th and 18th of August,—nearly two weeks before the Spanish duty was imposed. No one could know then that the Wilson bill would become a law, much less could it be known or contemplated that, if it did become a law, in consequence of it the Spanish government would retaliate so quickly by im-

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posing a higher duty upon lard imported from the United States. The damages claimed did not result from any act of the plaintiffs below, and, even if it could be so considered, they are too remote to come within the rule, which is general, that a person is not to be held responsible in damages for the remote consequences of his act, or, indeed, for any but those which are proximate or natural. 8 Am. & Eng. Enc. Law (2d Ed.) p. 561, and cases cited.

The damages claimed in the case are not only not the proximate consequence of any act done by the plaintiffs below, but they are highly speculative in character. When the contract was made, the chance that any such result would follow as the effect of the passage of tariff laws in the two countries was highly remote, and, whatever it might have been, must be considered as taken by the persons ordering the goods. Besides this, the finding of the court exonerates the defendants in error from all fault or negligence, and places the responsibility upon the steamship company, which refused to receive the lard on board until the next sailing, which was a week later; so that, whatever damages were sustained by the plaintiffs in error, they were not in any just sense the result of any act of the defendants in error. The judgment of the court below is affirmed.

(107 Fed. 692.)

UNITED STATES v. LOEB et al.

(Circuit Court of Appeals, Second Circuit. April 3, 1901.)

No. 22.

1. CUSTOMS DUTIES—BOARD OF GENERAL APPRAISERS—JURISDICTION—NOTICE OF DISSATISFACTION—NECESSITY.

   The customs administrative act of 1890 provides (section 13) that, if the collector shall deem the appraisement of any imported merchandise too low, he may order a reappraisement by one of the general appraisers, and that if the importer, owner, etc., shall be dissatisfied, and give notice thereof, or if the collector shall deem the reappraisement too low, he "shall transmit the invoice, and all the papers appertaining thereto," to the board of three general appraisers, to examine and finally decide the case. *Held*, that formal notice to the board of dissatisfaction by either the importer or collector was not needed to give it jurisdiction, transmission to it of the designated papers being sufficient, and hence the fact that a collector was satisfied, but ordered a reappraisement pursuant to instructions from the treasury department, would not nullify its action.

2. SAME—APPRAISEMENT—CONCLUSIVENESS—IMPEACHMENT.

   While, as a general rule, the valuation of appraisers is conclusive on all parties, the appraisement may be impeached if the appraiser or collector proceeded on a wrong principle, contrary to law, or transcended the power conferred by statute, or did not comply therewith.

3. SAME—DUTIES OF APPRAISERS—VIOLATION.

   The customs administrative act of 1890 provides (section 10) that the appraisers shall ascertain the actual market value and wholesale price of the merchandise at the time of exportation, "and the number of yards, parcels or quantities, and the actual market value or wholesale price of every one of them, as the case may require." Pursuant thereto the board of general appraisers made a report as to importations of Swiss

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laces, embroideries, and handkerchiefs, adding percentages to value, as appears by the following example: "On items invoiced at 18 centimes, stitch rate, add 36%; on balance of goods, add 10%." They did not, however, carry out on the invoice the value per aune (the Swiss unit) in francs and centimes, though this could easily be computed by the custom-house officers. *Held*, that there was no violation of the requirements of the statute.

4. SAME—TREASURY REGULATIONS—CONSTRUCTION.

Paragraph 845 of the treasury regulations provides that appraisers shall make advances on invoices on the unit value declared on entry, in the currency in which the invoice is made out, in a specific sum per pound, yard, or other unit of value, and not by percentage, and in the weight, gauge, or measure expressed in the invoice, but that no average valuation shall be made, and that the additions shall be made by writing on the invoice, opposite each item advanced, the words, "add to make market value," stating in numerals the amount necessary to make the price per unit. *Held* directory, and not mandatory, in the sense that neglect to conform thereto would create an illegal appraisal.

5. SAME—FAILURE TO PERSONALLY EXAMINE GOODS—EVIDENCE—INVALIDITY OF APPRAISEMENT.

Where importers distinctly testified that the board of general appraisers made no personal examination or investigation of invoices in question, as required by Rev. St. § 2901, and no opposing evidence was presented, the facts must be regarded as proved, notwithstanding the presumption in favor of the correctness of official action, and the appraisement must be held invalid.

Appeal from the Circuit Court of the United States for the Southern District of New York.

In 1898, Loeb & Schoenfeld made three separate importations into the port of New York of Swiss laces, embroideries, and handkerchiefs. No question arose in regard to the classification of the articles or the rate of duty, but a serious question arose in regard to their dutiable value. They were appraised by the local appraiser, and he advanced considerably the invoice and entered value. From this appraisal the importers appealed to one general appraiser, in conformity with section 13 of the customs administrative act of 1890, and he considerably reduced the local appraiser's valuation. The collector was satisfied with the general appraiser's valuation, did not think it too low, but yielded to the expressed desire and request of the secretary of the treasury for a revaluation, and appealed to the reappraising board of three general appraisers, and transmitted to them the invoices and papers appertaining thereto, with the following appeal appended to the several invoices: "I hereby appeal from the decision of the general appraiser in this case, and under the provisions of and in accordance with section 13 of the act of June 10, 1890, transmit the invoice to the board of general appraisers for a reappraisement of the merchandise covered thereby." This board, overruling the importers' demurrer, which raised the question of their jurisdiction, made a reappraisement, which advanced the value found by the one general appraiser. The collector liquidated the entries accordingly, and the importers paid the duties under written protests. The principal ground of the protests was the illegality of the liquidation, because it was based upon a reappraisement which the appraising board of general appraisers was without jurisdiction to make. The protests were transmitted to the board of general appraisers, designated under section 14 of the act of 1890, for the purpose of reviewing the action of the collector, and the board, after taking testimony upon the grounds named in the protests, found that the collector did not deem the reappraisement of the single general appraiser to have been too low, and did not state in his appeal that he so deemed, but that he appealed in compliance with the request of the secretary of the treasury; and upon the question of jurisdiction of the appraising board concluded that "a condition precedent to the acquirement of jurisdiction by said board is a statement by the collector, in proper form, that he deems the reappraisement of the merchandise

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made by a single general appraiser to be too low, and this requirement was not complied with when the collector ordered the reappraisement contrary to his own judgment, under instructions of the treasury department," and that the appraising board was therefore without jurisdiction to make the appraisement. The protests, so far as they relate to the question of jurisdiction, were sustained, and the collector's decision was reversed. The circuit court affirmed the decision of the board of general appraisers.

Henry C. Platt, for appellant.

W. Wickham Smith, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. It is urged by the appellant that the court below erred in adopting the conclusions of the board of general appraisers that the reappraisement of the dutiable value of the imported merchandise made by the board of three general appraisers, upon the appeal by the collector from the reappraisement of the single general appraiser, was void for want of jurisdiction. The board of general appraisers was of the opinion that the board of three general appraisers did not acquire jurisdiction, owing to the absence of a formal statement by the collector that he deemed the reappraisement of the single general appraiser too low, upon transmitting to the board the invoice and papers appertaining to the appraisement. The court below, assuming that a formal statement to this effect by the collector upon such an appeal is a condition precedent to the acquirement of jurisdiction by the board of three general appraisers, merely discussed in the opinion rendered the further question of the authority of the secretary of the treasury to intervene and coerce the action of the collector. The statutory provisions which control the question are found in section 13 of the customs administrative act of 1890. That section provides that, if the collector shall deem the appraisement of any imported merchandise too low, he may order a reappraisement, which shall be made by one of the general appraisers; that the decision of the general appraiser, in cases of reappraisement, shall be final and conclusive as to the dutiable value of such merchandise against all the parties interested therein, unless the importer, owner, consignee, or agent of the merchandise shall be dissatisfied with the decision, and shall within two days thereafter give notice to the collector in writing of such dissatisfaction, or unless the collector shall deem the appraisement of the merchandise too low; that, in either of these cases, "the collector shall transmit the invoice, and all the papers appertaining thereto," to the board of three general appraisers, which board shall examine and decide the case; and that the decision of this board, or that of a majority of them, shall be final and conclusive as to the dutiable value of such merchandise against all the parties interested therein, and the collector, or the person acting as such, shall ascertain, affix, and liquidate the amount of duties to be paid on such merchandise, and the dutiable costs and charges thereon, according to law.

As the board of three general appraisers is a special tribunal, and derives its jurisdiction from a compliance with the statutory requirements conferring it, it is undoubtedly true that its acts and decisions

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are coram non judice, unless the jurisdiction has been invoked pursuant to the terms of the statute by which it is conferred. But we find nothing in section 13 which requires a formal notice to the board of dissatisfaction by either the importer or collector as preliminary to the exercise of the jurisdiction to examine and decide the case submitted to the board. According to the terms of the section, if the jurisdiction is invoked by the importer, he must give notice of his dissatisfaction with the decision of the single general appraiser to the collector, and the collector is to "transmit the invoice, and all the papers appertaining thereto," to the board, and, if the jurisdiction is invoked by the collector, he must likewise "transmit the invoice, and all the papers appertaining thereto," to the board. The language of the section does not direct the collector to transmit to the board the importer's notice of dissatisfaction, or any signification of his own dissatisfaction. The section apparently does not contemplate that the board shall be informed as to the circumstance whether their jurisdiction is sought by the importer or by the collector. There is no conceivable reason why the board should be informed of this circumstance. It is not one which could properly influence their determination or their action in any way. Their duty is confined to examining and deciding the case submitted to them, and the single question involved in such a case is the dutiable value of the merchandise. Whether the importer is of the opinion that it has been appraised too high, or whether the collector is of the opinion that it has been appraised too low, are irrelevant considerations. In requiring that the "invoice and the papers appertaining thereto" shall be transmitted to the board, the statute obviously contemplates that these papers will be useful in assisting them in the discharge of their duty. As a notice of dissatisfaction on the part of either party would not be of the slightest use, the statute does not include one in the papers to be transmitted by the collector. We are of the opinion that it is the meaning of the section that the board shall acquire jurisdiction by the transmission to them of the designated papers. They are thereby informed that their jurisdiction is invoked, and that a case is before them for examination and decision.

If the conclusion thus reached is correct, the state of mind of the collector at the time of transmitting the papers to the board cannot affect its jurisdiction, and, having transmitted them, it is not relevant to inquire whether he was actuated by an honest sense of duty, or by the instructions of the secretary of the treasury. If it was the intention of congress that a reappraisement by the board could be nullified whenever it could be made to appear that the collector did not really think the appraisement by a single general appraiser was too low, it is not found in the language of the statute. If this were the meaning of the statute, the reappraisement could also be nullified whenever it could be shown that the importer was not really dissatisfied with the appraisement of the single appraiser, notwithstanding he had given written notice to that effect to the collector, and the statute would hold out a strong temptation to the importer to prove that fact whenever, upon a reappraisement, the dutiable value of the merchandise should be increased by the board. A construction which

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would infect reappraisements with such infirmities is quite inadmissible. If a notice of appeal was important, the transmission of the notice, with the invoices and accompanying papers, was sufficient to confer jurisdiction, and was conclusive upon that question. The appeal is an official act, which declares that the collector wishes the judgment of the appraising board upon a question of importance to importers and to the treasury, and precludes inquiry into the reasons which led him to appeal.

The importers also protested against the action of the collector in affixing the amount of duty in accordance with the valuation made by the appraising board, upon the ground that it violated the statutory requirements in two respects. "While the general rule is that the valuation is conclusive upon all parties, nevertheless the appraisement is subject to be impeached where the appraiser or collector has proceeded on a wrong principle, contrary to law, or has transcended the power conferred by statute," or has not complied with statutory provisions. U. S. v. Passavant, 169 U. S. 16, 18 Sup. Ct. 219, 42 L. Ed. 644; Oelbermann v. Merritt, 123 U. S. 356, 8 Sup. Ct. 151, 31 L. Ed. 164; Converse v. Burgess, 18 How. 413, 15 L. Ed. 455.

The first of this class of objections is that the appraising board made its additions to value by percentages, and did not state upon the invoices the value per unit in francs and centimes. Section 10 of the customs administrative act provides that the appraiser shall ascertain the actual market value and wholesale price of the merchandise at the time of exportation, "and the number of yards, parcels or quantities, and the actual market value or wholesale price of every one of them, as the case may require." The appraisers made a report which added percentages, as appears by the following example: "On items invoiced at 18 centimes, stitch rate, add 36%; on balance of goods, add 10%." They did not carry out upon the invoice the value per aune (the Swiss unit) in francs and centimes. This could easily be computed, and, of course, was computed by the custom-house officials, and the amount to be assessed by the collector was ascertained. There is no violation of a statutory requirement.

It is, however, said that paragraph 845 of the treasury regulations was not complied with, which is as follows:

"In making advances on invoices, the appraisers will make the addition to or advance upon the unit value declared on entry, in the currency in which the invoice is made out, in a specific sum per pound, yard, or other unit of value, and not by percentage, and in the weight, gauge, or measure expressed in the invoice, but no average valuation shall be made. In such cases the appraiser shall make the additions by writing on the invoice opposite each item advanced the words, 'add to make market value,' stating in numerals the amount necessary to make the price per unit."

This regulation was a very proper one for the guidance of appraising officers, and one which the treasury department was authorized to make, but it is evidently directory, and not mandatory, in the sense that a neglect to conform to it created an illegal appraisal.

The second objection is that the hand-made embroideries contained in invoice 5,446, protest 46,841b, by the Gascogne, entered February

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8, 1898, and the handkerchiefs imported by the Gascogne, entered March 7, 1898, were never examined by the appraising board, who neither had the cases nor samples of the goods, and could have made no personal examination or investigation of them. While the presumption is in favor of the correctness of official action, yet these facts were clearly testified to by the importers, who had adequate means of knowledge, and no opposing evidence was presented. The facts upon which the objection is founded must be regarded as proved.

Repeated decisions of the circuit and of the supreme courts are to the effect that a neglect of the appraisers to take the means required by statute for an examination of the goods in question invalidates the appraisement. Converse v. Burgess, 18 How. 413, 15 L. Ed. 455; Oelbermann v. Merritt, 123 U. S. 356, 8 Sup. Ct. 151, 31 L. Ed. 164. Section 2901 of the Revised Statutes requires one package in ten to be opened, examined, and appraised, and in regard to the two named classes of articles the appraisers had neither package nor samples. They had a package of another importation containing embroideries, and a package containing handkerchiefs of another importation, the value of which was not advanced, but had no samples from the particular importation, and the articles in the packages in the public stores were not identical with the goods of which they had neither packages nor samples.

The decision of the circuit court which affirmed the decision of the board of general appraisers is affirmed as to the protests against the action of the collector in regard to the hand embroideries and the handkerchiefs in the two invoices named herein, and is reversed as to the other grounds named in the protests.

(107 Fed. 340.)

YEISER et al. v. UNITED STATES BOARD & PAPER CO.

(Circuit Court of Appeals, Sixth Circuit. February 12, 1901.)

No. 846.

1. CORPORATIONS—DUTIES AND LIABILITIES OF PROMOTERS—SECRET PROFITS.
   Promoters of a corporation, who become stockholders therein, assume a trust relation to the company and the other stockholders, which binds them to act openly and in good faith in all matters connected with its organization, and the acquiring of the property necessary for the transaction of the business for which it is organized, and they will not be permitted to make a secret profit on the sale of such property to the corporation, at least when by making themselves officers and directors in the initial organization they control the corporation, and assume to act in its behalf in making the purchase.[1]

2. SAME—REMEDY OF CORPORATION.
   Two of the defendants obtained an option to purchase a manufacturing plant for $75,000, their purpose being to organize a corporation to take over and operate the property. Together with the other defendants, whom they associated with them, they organized a corporation, placing the capital stock at $100,000, of which defendants subscribed for $25,-

[1] See note at end of case.

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000, and elected themselves its directors. The holders of the option made a proposition to sell the property to the corporation for $100,000, which was accepted by the directors, and upon that basis defendants sold stock to others. When sufficient had been sold and paid for to enable the company to make the purchase on the terms agreed upon in the option, the board of directors, which had been changed somewhat in its membership, but was still controlled by defendants, again voted to buy the property for $100,000, and it was purchased by the defendant, who was president of the company, and a deed taken directly from the owners to the company, reciting a consideration of "one dollar and other valuable considerations." By means of cross checks, it was made to appear on the books of the company that defendants had paid for their stock, when in fact it was received as a profit on the transfer of the property. The majority of the stockholders had no knowledge of the price actually paid to the former owner for the property, but supposed it to be $100,000, until after the company had taken possession and was operating the plant, when, on learning the facts, they elected other officers, and the company brought suit against defendants for the cancellation of their stock. *Held* that, under the circumstances shown, the benefit of the purchase made by the holders of the option inured to the company, regardless of the actual value of the property, and that, since the purchase from them could not be rescinded without great injustice to the company, the cancellation of the stock as prayed for was an appropriate remedy.

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

The bill in this cause was filed in the circuit court by the United States Board & Paper Company, the appellee here, for the purpose of obtaining a decree annulling certain certificates of stock in the corporation complainant alleged to have been unlawfully obtained by Browne, Stuart, Bell, Province M. Pogue, and Thomas L. Pogue, the defendants named in the bill, two of whom—Browne, by representation of Yeiser, his administrator, and Stuart—are the present appellants. The bill also prayed for such other and further relief as the nature of the case might require. During the pendency of the suit, Browne has deceased, and, upon the suggestion of his death, the suit was revived as to that defendant by substituting Yeiser, the administrator of his estate. All the defendants, except Bell, against whom the bill was taken as confessed, appeared and answered, denying the material allegations thereof on which the claim to relief was founded. A replication was filed and proofs were taken. Upon final hearing, the court granted the specific relief prayed for in the bill. Two of the defendants only—Yeiser, as administrator, and Stuart—have appealed, the other defendants having declined to join. Details of the material facts are stated in the opinion which follows.

Province M. Pogue and C. B. Matthews, for appellants.

C. M. Thompson and Frank M. Gorman, for appellee.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

SEVERENS, Circuit Judge, having made the preceding statement, delivered the opinion of the court.

From the record it appears that in the latter part of June, 1896, the defendants Browne, Stuart, and Bell conceived the project of taking an option to purchase the paper-mill plant of the Leonard Paper-Box Board Company, hereinafter called the "Leonard Company," located at Carthage, Ind., and organizing a company, obtaining stock subscriptions, and with the proceeds of such subscriptions buying the mill for the company at an advanced price, which would enable them to make a considerable profit. With this scheme in view, and for the purpose of carrying it out, Browne and Stuart,

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on July 17, 1896, after some preliminary negotiations, secured from the president and secretary of the Leonard Company an option to purchase their plant within 90 days for the sum of $75,000. There was no vote of the stockholders or board of directors of that company authorizing the granting of the option. On the 23d day of July, 1896, Browne, Stuart, Bell, Province M. Pogue, and Thomas L. Pogue incorporated the company, with the title of the United States Board & Paper Company, and with a capital of $100,000, under the laws of Indiana, by filing articles of association thereof in the proper office, and the said incorporators adopted by-laws for the company. On the 3d day of August, following, these five persons subscribed, but did not pay, for $25,000 of stock, and, they being thus far the only subscribers for stock, elected each other directors. They constituted the whole board. Bell was authorized by the board to solicit additional subscriptions to the capital stock. Browne and Stuart submitted a proposition to sell to the company the mill property at Carthage for $100,000, the deed to be made by the Leonard Company. This proposition was accepted by the unanimous vote of the board. A prospectus was prepared by the directors, which, together with the minute book of the proceedings of August 3, 1896, was used by Bell in soliciting subscriptions as evidence of the condition and prospects of the company. It was stated among the great advantages of the company that the business would not have to be delayed for the building of a mill, for the complete strawboard mill of the Leonard Company could be transferred by Browne and Stuart to the company, just organized, for $100,000, and the operation of the mill would go on without interruption; and this, it was said, was a "feature worth alone $50,000 to the stockholders." Equipped with the prospectus and minute book, Bell secured in a few months cash subscriptions for stock to the amount of $45,000. On the 16th day of December, 1896, although the option of July 17, 1896, had been renewed and was still open, Browne and Stuart made a fresh proposition to the Leonard Company to buy the mill property for $40,000 in cash, and $35,000 in the bonds of the new company, secured by mortgage on the property, upon the condition that the latter company should, before the 1st of January following, accept a proposition submitted to it by Browne and Stuart for the sale to it of the same property. This proposition was accepted by the Leonard Company at a meeting of its stockholders. On the 19th day of the same month, all of the subscribers to the additional $45,000 of stock, which had been sold after the meeting of the directors in August, paid in the sums which they had subscribed, each one at that time supposing that the purchase price of the mill which their company was buying was $100,000, except two. One of these persons was Henry C. Yeiser, an intimate personal friend of Browne and Stuart, who had at their request subscribed for $3,500 of the stock, to pay for which they advanced the money. They requested him also to become a director, telling him of the profit they were intending to make out of the sale of the mill to the company, and asked him not to disclose that feature of the transaction to the other directors or stockholders. All this he agreed to.

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The other of the new stockholders who was aware of the actual price at which the mill was sold was E. N. Hill, who was also a stockholder in the Leonard Company. He was induced by Browne to subscribe for $3,000 of the stock in the new company, upon the agreement that he should have $1,000 of the $25,000 of stock which had been originally subscribed, and should be given employment by the new company. This arrangement with Hill was not known to the other subscribers. On the same 19th day of December, Stuart and the two Messrs. Pogue withdrew from the directory, and Yeiser, J. H. Duncan, and H. M. Wrigley, the latter two being new subscribers, were chosen in their places. Neither Duncan nor Wrigley had any knowledge of the actual price at which the mill was purchased from the Leonard Company, but supposed it was $100,000. On the same day the following resolution, which had been previously prepared, was passed by the new board of directors:

"That whereas, the company is desirous of purchasing the paper-making plant located at Carthage, Indiana, from Browne and Stuart, who have purchased the same from the Leonard Paper-Box Board Co.; and whereas, the directors have made careful examination as to the investment and the conditions of the deed provided for by Browne and Stuart from the Leonard Paper-Box Board Company to the United States Board and Paper Company; and whereas, it is for the best interests of the company to further its business in purchasing the same; therefore be it resolved, that pursuant to the authority vested in us by the articles of incorporation and by-laws of the stockholders, that we purchase said plant, with its good will and appurtenances, for $100,000, and in payment therefor, pay $65,000 cash, and in payment of the balance that bonds of the company, to the value of $35,000, being seventy bonds, of $500 each, the bonds numbered from one to thirty-five, inclusive, being payable in one year from the date of the execution of the trust mortgage hereinafter referred to, and bonds Nos. 36 to 70, inclusive, being payable in two years after the date of the execution of the trust mortgage, with interest coupons attached, payable semiannually, at the rate of 7 per cent. per annum, be issued and duly signed by the president and secretary, who are hereby authorized, empowered, and directed to sign the same; and be it further resolved, in connection therewith, that the president and secretary execute the trust mortgage deed of the company to Louis Leonard, trustee, of Piqua, Ohio, to secure said issue of bonds, and that the said mortgage deed be given on all real estate of the company situated at Carthage, Indiana."

On the 22d of December, 1896, a deed with full covenants of warranty from the Leonard Company was executed and delivered. This deed recited a consideration of "one dollar and other valuable considerations." The officers of the Leonard Company were requested to allow the deed to recite a consideration of $100,000. But as they objected to this, and those managing the business for the new company were not satisfied to have the consideration stated at $75,000, it was finally concluded to put it as it appears in the deed. On the same day the following transaction took place: Browne and Stuart, to pay for the original stock subscription of themselves and their associates, gave to the United States Board & Paper Company their check on the Equitable National Bank for $25,000, without having the money there to pay for it. Browne, as president of the United States Board & Paper Company, gave that company's check on the same bank to Browne and Stuart for $65,000. To the extent of $25,000, the $65,000 satisfied the check given by Browne and Stuart for their shares, and the remaining $40,000 went through

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Browne and Stuart to pay the cash part of the purchase price agreed to be paid by Browne and Stuart to the Leonard Company for the mill. A mortgage to secure the bonds was given as contemplated. The result of all this was that Browne and Stuart received from their own company the $25,000 wherewith they paid for their stock subscription, and it is the validity of this stock that is the matter in controversy. Certificates therefor were eventually issued, $8,300 each to Browne and Stuart, $8,200 to Bell, and $100 each to the Messrs. Pogue, the two latter having been concerned as attorneys only for the others in the preparation of the papers used in conducting the business, and standing for directors in the organization of the company, presumably for the parties principally interested. But it is not questioned that all these parties were aware of the facts above referred to, as they transpired. The business of the new company went on, and the stockholders, other than as above stated, remained in ignorance of the fact that the purchase price of the mill to the Leonard Company was only $75,000. But it was finally discovered, and at a meeting of the stockholders, held shortly afterwards, a resolution was passed directing the bringing of the present suit. Judge Thompson, at the circuit, held, in a well-considered opinion, that the company was entitled to the relief prayed, and we are of opinion that he reached the right conclusion.

It is a well-settled principle of equity that those who participate in bringing about the organization of an incorporated company, and in getting it in condition for transacting the business for which it is organized, assume the obligations of a trust towards the company and those who shall be invited to come into the enterprise as stockholders and share in its fortunes. The latter have the right to rely on the good faith and fair dealing of those who have promoted the company, and to assume that they have not perverted the organization by secret means to the accomplishment of selfish purposes, and the destruction of that equality of right which, in the absence of some known modification, all the shareholders are entitled to enjoy. Indeed, some of the decided cases hold a wider doctrine, and declare that, whether the promoter becomes a stockholder himself or not, he owes a like duty to those who became such, and cannot, by covert manipulation of the company while it is under his control, and without the faculty of acting for itself, take a personal profit from his dealings with it. The recognition of a fiduciary relation in such circumstances is merely for the application of a familiar principle of equity, which fastens a trust upon one who has such power over another and his affairs as to give the former an opportunity to make personal gains in his dealings with them.

The reasons for the enforcement of that principle in such cases as this are obvious. Without it there is nothing to hinder the concoction of schemes which the reports of decisions show are becoming quite too frequent in recent years, during which corporations have so greatly multiplied, whereby one may take an option or conditional contract for the purchase of property, and then turn it over, at a profit to himself, to a corporation to be organized, and

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be under his own control for a sufficient time to enable him to realize the fruits of his enterprise. Unless the promoter of the company is restrained by the obligations of a duty which prevents him from bringing the consequences which are liable to result to others who may be led into danger, he may practice such schemes with impunity. Of course, these observations do not apply to a case where the corporation, having knowledge of the facts and freedom of action, consents to a contract proposed by another, even though he may be a stockholder or a director. The corporation could not in such case complain, nor could a stockholder, if there had been no actually fraudulent purpose towards him. In the present case, while there is some conflict of testimony in the minor details, there is really no room for dispute in regard to the controlling facts.

It is clear that the purpose to organize a corporation to take the mill property, if it should be purchased, was formed in the beginning. The option to purchase the property was not taken with a view to the use of it by the parties to whom the option was given. The option was renewed and kept alive while the corporation was being organized, and as soon as form was given to the latter, so that it was supposed to be competent to act, and its board of directors had formally accepted the proposition of Browne and Stuart to sell the mill to the company, and all things had been shaped to a definite assurance that the sale to the company would go through, and there were sufficient means secured to pay for it, the bargain with the Leonard Company was closed, and the title to the property was conveyed directly from the Leonard Company to the company which Browne and Stuart and their associates had brought into existence.

When, on August 3, 1896, Browne and Stuart made their proposition to sell the mill to their company, and they and their cooperating associates, acting as the board of directors, accepted it for the company, the company was completely in fetters. While it was made to be a purchaser, it was dominated by the seller. It had no organ for seeing, hearing, or even knowing what was going on. Its whole constituency was engaged in bringing about the sale for the sellers. We have, on several occasions, held that where one who assumes to act as the agent of another in a given transaction is really acting as the agent of a third person, or in behalf of some scheme of his own, his apparent principal, having no knowledge of such alien purpose, is not bound by such pretended agent's acts, nor by any notice or knowledge of facts which such agent had at the time the transaction was going forward. Thomson-Houston Electric Co. v. Capitol Electric Co., 12 C. C. A. 643, 65 Fed. 341; Wilson v. Pauly, 18 C. C. A. 475, 72 Fed. 129, 134; Louisville Trust Co. v. Louisville, N. A. & C. R. Co., 22 C. C. A. 378, 75 Fed. 433, 469. And see Surety Co. v. Pauly, 170 U. S. 133, 18 Sup. Ct. 552, 42 L. Ed. 977; Innerarity v. Bank, 139 Mass. 332, 1 N. E. 282. This rule is supported by still stronger reasons where the principal is in such condition that it can by no possibility either learn the facts or have any judgment to form its own course with regard to them.

The farcical nature of this transaction must have been apparent to the actors, for it was subsequently arranged that it should be

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confirmed after the cash subscriptions to the stock had been obtained and paid in. Then, three of the directors stepped out, and three new ones were brought in, but the efficiency of the board for consummating the scheme was not thereby affected. Browne and Bell remained, and Yeiser was a nominee of Browne and Stuart, under a pledge of co-operation. Duncan and Wrigley, the other new members, although they had no knowledge of the purpose of the others, and therefore no motive to wrong the corporation, were, from the very fact of their want of knowledge, of no service in defending the interests of the company. It seems probable that Stuart's resignation, at least, was made for the purpose of giving a fairer show to the directorate, and inspiring confidence in the good faith of the transaction. In truth, however, the corporation was still as completely in the hands of the parties who were seeking to sell the mill to it for $100,000 as before. They had a majority of the board, and could pass the measure whether opposition was made or not. The other two members were new men. They knew of no ground for raising a question, and naturally they would have confidence in the men who had been promoting the enterprise.

And thus, again, when the transaction was finally consummated, the company not only had no notice of the fact, but was helpless to protect itself if it had had such notice, and all of the stockholders who were not in the scheme were still equally ignorant of the fact thus purposely concealed. It is evident that the actors planned that the stockholders should remain ignorant. They not only refrained from communicating any information on the subject themselves, but they framed their prospectus in a way to mislead. They secured a promise of secrecy from Yeiser. They silenced Hill with a premium. They gave their check for the $25,000, which they never paid, and inserted a blinding consideration in the deed from the Leonard Company. The stockholders had visited and examined the mill property at Carthage, and were satisfied with it and the price to be paid. How it should have happened that no one of them should have learned of the price at which it was to be bought on the occasions of these visits, is left a matter for inference.

The cases in which the principle of equity which we have endeavored to state has been declared and illustrated are quite numerous, both in England and in this country. We shall refer to a few of them only. The leading English case is that of Phosphate Co. v. Erlanger, 5 Ch. Div. 73, in the court of appeals; the same case in the house of lords, 3 App. Cas. 1218, the names of the parties being reversed. The facts were that the Baron Erlanger and his associates, who were under his control, purchased, for the purpose of speculation, a lease of the island of Sombrero, on which were phosphate mines, for the sum of £55,000. Having procured the lease to be assigned to one Evans, an agent of Erlanger, they proceeded to organize a company for mining purposes, to which they intended to sell the lease at a large profit. They established a board of directors, consisting of five members, of whom two were out of the country. Of the other three, one was Evans, who held the lease; another was MacDonald, who was a near friend of Erlanger, and to whom Er-

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langer transferred some stock to qualify him; and the other was Dakin, who was a large stockholder, but who knew nothing of the purpose of selling at a profit. At a meeting of the board of directors, consisting of those last named, a proposition from Erlanger to sell the lease to the company for £110,000 was accepted. A prospectus was issued, which stated, among other things, that the lease of the island had been secured for £110,000, and reciting numerous facts to show the value of the bargain. A large number of subscribers were induced to take and pay for shares in ignorance of the profit which was being made by Erlanger and his associates in selling the lease to the company. The truth eventually leaked out, the board of directors was reconstituted, and the new board was authorized to bring suit to recover the amount of profit which the promoters had made on the sale to the company of the lease, and this was done. There were other facts on which incidental questions arose, but the foregoing constitute the main case. On the hearing, the bill was dismissed by the vice chancellor, but on appeal the decree was reversed by the unanimous judgment of the court of appeals, and a decree ordered that the contract of purchase be rescinded, and that other incidental relief be granted. The defendants thereupon appealed to the house of lords, where the case was twice argued, the last time before seven of the law lords,—an unusual number,—and the judgment of the court of appeals was confirmed, and the appeal dismissed. The lord chancellor (Lord Cairns) did not concur, because he thought there had been laches in bringing the suit, but all concurred in holding that the company was entitled to the relief if the suit has been seasonably brought. The case was in all its essential particulars like that at bar, and all the principal grounds and reasons for decision which have been raised and argued here were elaborately discussed. The same fact, upon which so much reliance has been placed by the appellants here, existed in that case, namely, that the promoters had already acquired the right to the benefits of their purchase from the former owners, and were in a position to sell their purchase to any one who would buy. Indeed, the defendants in that case had a firmer advantage, for they had actually acquired the property before they formed the company, while here the defendants had not made any purchase, but only made secure the way by which the property could be sold to the company which they proposed to organize, and this difference was a fact much relied upon by Vice Chancellor Malins in the court of first instance. We cannot give space to recite the reasoning of the elaborate judgments given in the case, but the final decision firmly established in England the doctrines which we think it right to apply to the present case. Another case to which we intended more especially to refer is that of Gluckstein v. Barnes [1900] App. Cas. 240, which was also a case in the house of lords. In that case a syndicate was formed to buy certain property and resell it to a company, to be formed for the purpose, of which the directors should be the trustees of the syndicate. These trustees bought up some charges on the property, on which they realized £20,000 for the syndicate. The price of their purchase of the property itself was £140,000,

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and they sold it to the company, at a time when they were directors, for £180,000. The prospectus showed this, but did not show the profit of the £20,000 made in buying up the charges on the property. This latter fact was concealed from the persons who became stockholders, but, being eventually discovered, suit was brought by the official receiver of the company to recover the £20,000. The suit was sustained by the house of lords, upon the ground that the promoters had been, from the time of their original purchase of the property, acting in a fiduciary relation to the company to which they proposed to convey it, and that the profit belonged to the company; and it was further held that, as the circumstances had rendered it impracticable to rescind, the company might recover the money gained by the promoters. Much emphatic language was used by the law lords in giving judgment in that case. It is sufficient to say that the doctrine of the Erlanger Case was repeated, and the various devices employed in such schemes were condemned with much energy. Other English cases in which the subject has been discussed, upon facts more or less similar to those of the case we have in hand, are Hichens v. Congreve, 4 Russ. Ch. 562; Beck v. Kantorowicz, 3 Kay & Johns, 230; Gover's Case, 1 Ch. Div. 182; Twycross v. Grant, 2 C. P. Div. 469; Bagnall v. Carlton, 6 Ch. Div. 371; Printing Co. v. Green, 5 Q. B. Div. 109; Mining Co. v. Lewis, 4 C. P. Div. 396; In re Cape Breton Co., 29 Ch. Div. 795; and Ladywell Min. Co. v. Brookes, 35 Ch. Div. 400. They do not differ in the essential principles upon which they were decided, though in some of them the vital fact that the property bought for the purpose was imposed by the promoters upon their company, coerced by themselves to take it at a price yielding them a profit, did not exist, and, of course, the absence of this circumstance led to the exoneration of the promoters.

In this country the courts have accepted the essential principle laid down in the English cases, and hold, with scarcely any variation, to the doctrine that the promoter of a company stands in the relation of a trustee to it and those who become subscribers to its stock, so long as he retains the power of control over it. There is some difference of opinion, as there is in the English cases, in regard to the time when he becomes such promoter, within the meaning and operation of the rule. Some courts are of opinion that he is chargeable with the duties of a trust when he enters upon the execution of the scheme which is intended to result in the transfer of the property to a company to be organized and controlled by him. All, however, agree that he comes within the rule when he begins to organize the company, and that from that time he is bound to deal openly and fairly, and in such a way as that those having independent charge of the company, as well as those who are induced to become subscribers to its stock, may be fully advised of the relation he bears to the property which he proposes to sell, in like manner as one who assumes to act as the agent of another in the purchase of property. We refer to a few of the well-considered cases in this country which support what we regard as the doctrine settled upon sound reasons: Brewster v. Hatch, 122 N. Y. 349, 25 N. E. 505; Land Co. v. Case, 104 Mo. 572, 16 S. W. 390; Hebgen v. Koeffler, 97 Wis. 313, 72 N. W. 745; Oil Co. v. Densmore, 64 Pa. 43; Hayward v. Leeson (Mass.)

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57 N. E. 656; Burbank v. Dennis, 101 Cal. 90, 35 Pac. 444; Stove Co. v. Wilcox, 64 Conn. 101, 29 Atl. 303, 25 L. R. A. 90. The particular subject does not seem to have been before the supreme court of the United States for consideration, but there have been at least two decisions at the circuit, and they are in harmony with the views we have expressed. Chandler v. Bacon (C. C.) 30 Fed. 538, per Colt, C. J.; Cortes Co. v. Thannhauser (C. C.) 45 Fed. 730, per Wallace, C. J.

The company, as well as the stockholders, are entitled to the benefit of the independent judgment of the trustee in regard to the value of the property to be purchased, and the price to be paid, as well as its fitness for the intended use. It is said that the property was worth what the company paid for it, and is adapted to the company's requirements. It happens so. But this in no manner affects the operation of the rule. The benefit of the purchase by Browne and Stuart inured to the company. In the present instance the conveyance was with covenants of warranty by the Leonard Company, and the price which that company received would seriously affect the measure of the liability of the vendors by reason of those covenants.

With regard to the kind of relief which should be awarded, it must be adapted to the situation at the time when it was applied for; that is, when the suit was commenced.

There could not be a rescission without gross injustice to the parties wronged. The business has gone on with the use of the mill. It could not be restored without serious prejudice to the interests of the company. We do not think the defendants have any equity to have it restored. It was the company's money which paid for it. It is quite clear that the defendants did not intend to make the purchase for their own use. The substance of the whole matter is that through their breach of trust they were enabled to get $25,000 of the company's stock without paying for it. It seems to us that a decree annulling their title to it is an appropriate remedy. The decree of the circuit court is affirmed.

NOTE.

Acts of Corporators and Promoters.

1. In General.

[a] (U. S. C. C., Cal., 1893) R. agreed to convey certain property to H., or to a corporation to be formed by H., and H. agreed to pay R. $5,000, to issue to him half of the capital stock of the corporation, and to deposit with the corporation's treasurer $25,000, to be used in developing said property. *Held*, that the $25,000 paid to the corporation should not be credited to R. on the books of the company.—Hardee v. Oil Co., 56 Fed. 51.

[b] (Cal. Sup. 1892) By an instrument preliminary to incorporation, the subscribers agreed to take the number of shares set opposite their names respectively, and to pay 20 per cent. of the par value of the shares so subscribed to one W. By the same instrument the subscribers appointed defendants and another as their agents and as the agents of the corporation to be formed, with authority to purchase property for the corporation, and to draw from W. the money paid to him, and to use such money in paying for the property purchased. *Held*, that defendants and their colleague were authorized, as agents of the subscribers, to negotiate for the purchase of property until the formation of the corporation, when their agency for the subscribers would cease, and thereafter they should act for the corporation. —Water Co. v. West, 29 Pac. 785, 94 Cal. 399.

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[c] (Mass. Sup. 1889) Where suit is brought by the members composing a projected corporation, for breach of a contract made in the name of the corporation, plaintiffs are not limited to the damages they themselves have suffered, independently of their membership of the association, but may recover damages suffered by the new organization in being unable to carry on a profitable business on account of defendants' failure to perform the contract. —Abbott v. Hapgood, 22 N. E. 907, 150 Mass. 248, 5 L. R. A. 586, 15 Am. St. Rep. 193.

[d] (Mass. Sup. 1889) Where a contract is made in the name and for the benefit of a projected corporation, a judgment in an action by the corporation on the contract is no bar to an action by the individuals who made the contract.—Abbott v. Hapgood, 22 N. E. 907, 150 Mass. 248, 5 L. R. A. 586, 15 Am. St. Rep. 193.

[e] (Mich. Sup. 1886) A contract with those intending to form a corporation, concerning the affairs of the company when formed, is only a contract with individuals.—Carmody v. Powers, 26 N. W. 801, 60 Mich. 26.

[f] (Mich. Sup. 1892) B., the receiver of two railroad companies, desiring to connect the roads, caused a railroad company to be organized, and became one of the stockholders. None of the stockholders paid anything on their stock, but it was claimed that B. paid the proportion of the capital stock required by statute before the company could do business. B. made a contract with the fiscal agent of the company, whereby he was to receive all the bonds and stock of the company, except 25 shares not issued, in consideration of building the roadbed and bridges, and furnishing the rails, ties, and planking. No provision was made for side tracks, switches, water tanks, stations, or rolling stock. The contract provided that the right of way, if not procured by the company, should be acquired by B., and that he should receive $1,000 per mile in cash therefor; but no bonds, stock, or money was left with which the company could procure the way. *Held*, that B. was the company; that he really made said contract with himself; and that the whole scheme was a fraud on the statute authorizing the organization of railroad companies.—Railway Co. v. Miller, 51 N. W. 981, 91 Mich. 166; Same v. Haslett, Id.

[g] (Minn. Sup. 1898) The presumption is that a promoter of a corporation is connected therewith for the legitimate purpose of organization, not for the illegitimate purpose of conspiracy to defraud.—Benton v. Manufacturing Co., 76 N. W. 265, 73 Minn. 498.

[h] (N. Y. App. 1879) The functions of "corporators" of an insurance company cease with the organization; afterwards they are "stockholders," and not liable as "corporators," under the act of 1849.—Chase v. Lord, 77 N. Y. 1.

[i] (N. Y. Sup. 1869) Where each of the parties to an agreement to form a corporation had a claim under it against the other, contingent or conditioned to become due upon the formation of the corporation, such claim becomes due on the formation of a legal corporation only, and each party is presumed to know what requisites the law demands in order to create such a corporation.—Childs v. Smith, 55 Barb. 45.

[j] (N. Y. Sup. 1875) A check taken by a promoter of a corporation for subscription to stock becomes the property of the corporation when it is organized, and it can sue thereon.—Railroad Co. v. Gere, 6 Thomp. & C. 636.

[k] (N. Y. Sup. 1895) A secret agreement between the directors and promoters of a corporation, by which the promoters are to receive a share of the profits before any dividends are paid, is, in effect, creating stock without certificates, paying dividends without stock, and increasing the capital stock without complying with the statutory requirements, and is invalid.—Dillon v. Cable Co., 34 N. Y. Supp. 370, 87 Hun, 444.

[l] (N. C. Sup. 1898) Where promoters of a corporation held proxies of a majority of the shares of the company, and voted the same in making a contract whereby they received certain nonassessable, paid-up stock, such contract was not void on its face.—Gaines v. McAlister, 29 S. E. 844, 122 N. C. 340.

[m] (Pa. Sup. 1858) Where nine commissioners, or any three of them, were authorized to organize a corporation, and a majority corruptly agreed to transfer the franchise to a nonresident without any bona fide subscription

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to the stock, a minority of three commissioners could proceed with the organization, and the letters patent issued in pursuance thereof were valid.—Com. v. McKean County Bank, 32 Pa. 185.

[n] (Pa. Sup. 1868) Action for fraud will lie against those who certify falsely for the purpose of obtaining a corporate charter.—Cochran v. Arnold, 58 Pa. 399.

2. Who are Promoters.

[a] (Kan. Sup. 1887) To constitute a person a promoter of a railway corporation, it must affirmatively appear that he was acting for and in behalf of the proposed incorporation, or that he assumes to so act, and that, on the strength of this authority or assumption, the party complaining so dealt with him.—Railroad Co. v. Tiernan, 15 Pac. 544, 37 Kan. 606.

[b] (Mo. App. 1898) An assignee for the benefit of creditors obtained the consent of the creditors to the transfer of the assigned property to a corporation, and their assignment to it of their claims. The creditors duly assigned, and the assignee promised that the corporation would assume and discharge the claims. *Held*, that the assignee was acting as the promoter of a corporation.—Pitts v. Mercantile Co., 75 Mo. App. 221.

[c] (N. J. Sup. 1898) One who engages with the owner of a tract of land in organizing a corporation to purchase the land, by procuring subscribers, frames the prospectus, and becomes one of the first subscribers, is a promoter of the corporation.—Loudenslager v. Land Co., 41 Atl. 1115, 56 N. J. Eq. 411, affirming (Ch. 1896) 35 Atl. 436, 55 N. J. Eq. 78.

[d] (Pa. Sup. 1898) A person who might, at the inception of a corporation, be deemed the promoter, cannot, after the corporation has been in existence, organized, and operated by a board of directors for more than a year, be considered as such, so as to then hold him to a promoter's fiduciary liability in dealing with the corporation.—Russell v. Fuel-Gas Co., 39 Atl. 21, 184 Pa. 102, 41 Wkly. Notes Cas. 364.

3. Failure to Organize Corporation.

[a] (Ill. App. 1895) In order to hold the promoters of an abortive corporation for money paid on a subscription thereto, it must be shown that the person receiving the money sought to be recovered was authorized to receive it for them or for the corporation, and that he in fact did so receive it.—Fitzwilliam v. Travis, 65 Ill. App. 183.

[b] (Mass. Sup. 1812) Where certain persons associated to establish a bank, and at a meeting of the association at which all were not present an agent was appointed to attend the legislature to procure a charter, who attended accordingly, but failed to obtain the charter, the associates were jointly liable to him for his services.—Sproat v. Porter, 9 Mass. 300.

[c] (N. Y. Sup. 1872) The plaintiff agreed to sell a patent, and to execute all proper conveyances therefor to the defendants, who on their part agreed to organize a company under the patent, and to pay to plaintiff a certain amount in cash, and a certain amount in stock of the company to be organized, for the patent and the tools and materials. *Held*, that the agreement was personal with the defendants, and the plaintiff could recover from them damages for neglect or refusal to organize the company.—Kirschmann v. Lediard, 61 Barb. 573.

[d] (N. Y. Sup. 1889) Defendants and others signed a subscription paper preliminary to incorporation of a baseball company. Subsequently a meeting was held, and a president, secretary, and five directors were chosen. It was also resolved that no further steps towards incorporation should be taken, and that the money subscribed should be paid to the directors, who were to have the sole management of matters, and that, when the money so subscribed should be spent, no more should be called for. One H., who was one of the subscribers, was present at the meeting, and he afterwards furnished board to some of the ball players, the claim for which he assigned to plaintiff. There was evidence that some of the defendants, including H., expressly agreed that their liability, in any matter connected with the club, should not extend beyond the amounts they had subscribed. *Held*, that the failure to form a corporation did not make the subscribers a partnership,

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as between themselves, and that plaintiff could assert no rights against defendants which H., as one of their number, could not have asserted.—Hudson v. Spaulding, 6 N. Y. Supp. 877, 53 Hun, 638.

[e] (Pa. Sup. 1899) Where plaintiff advanced money for stock in a company to be organized by defendants, the company must be organized within a reasonable time, or the money refunded.—Hudson v. West, 42 Atl. 190, 189 Pa. 491, 29 Pittsb. Leg. J. 283.

[f] (Pa. Sup. 1899) Where plaintiff advanced money to defendants, who agreed to give in return stock in a company to be organized for the manufacture of certain patented articles, it is no defense to an action to recover the money, on failure to organize the company, that it was used in the development of patents, and other expenses looking towards the formation of the company.—Hudson v. West, 42 Atl. 190, 189 Pa. 491, 29 Pittsb. Leg. J. 283.

[g] (Pa. Sup. 1899) In an action to recover money advanced by plaintiff in consideration of an agreement to give him stock in a company to be organized by defendants to manufacture certain patented articles, evidence as to who would have control of the patents when issued is immaterial.—Hudson v. West, 42 Atl. 190, 189 Pa. 491, 29 Pittsb. Leg. J. 283.

[h] (Pa. Sup. 1899) Where defendants, in consideration of money advanced by plaintiff, agreed to give him stock in a company to be formed, their want of success in the formation of the company is no defense in an action to recover the money.—Hudson v. West, 42 Atl. 190, 189 Pa. 491, 29 Pittsb. Leg. J. 283.

4. Notice to Corporators and Promoters as Notice to Corporation.

[a] (Ill. Sup. 1877) The fact that a corporator, who is not an agent in forming the company, knows of an incumbrance on the property purchased by the corporation, will not charge his associates with notice, whatever may be the effect on his own interest.—Burt v. Manufacturing Co., 86 Ill. 66.

[b] (S. D. Sup. 1894) The knowledge of the principal promoter of a corporation, who acquires his knowledge as such promoter, and who, on its organization, becomes its manager, is the knowledge of the corporation.—Bindery Co. v. Kittleson, 57 N. W. 233, 4 S. D. 520.

5. Liability of Corporation and Stockholders to Promoters.

[a] (Md. App. 1861) An agreement between C. and V. recited that C. had contracts for coal mines; that he conveyed his rights to V., who was to make the payments, take the title, hold it for joint account, subject to his reimbursement, and to dispose of it as directed by the agreement. It also provided that V. and his associates should form a corporation, fixing the capital according to the value of the property, and convey the property to the corporation, the stock to be issued in V.'s name; that he should sell sufficient to reimburse himself, and to pay a certain sum to C., and to raise a cash capital to be owned by the corporation; that, "after making the sales and payments aforesaid, V. shall next transfer one-twentieth of the whole of said capital stock to T.," and divide the balance with C. *Held*, that V. was to be reimbursed, and the capital raised, before T. had any.—Varnum v. Thruston, 17 Md. 470.

[b] (Mass. Sup. 1900) Promoters of a corporation, who have incurred expenses and paid out money in procuring options for the benefit of the prospective corporation, are entitled to reimbursement therefor on creation of the corporation.—Hayward v. Leeson, 57 N. E. 656, 176 Mass. 310, 49 L. R. A. 725; Same v. Hopewell, Id.

[c] (N. Y. Sup. 1900) Where subscribers to corporate stock agreed with promoters to use their efforts to facilitate the organization of the corporation according to a certain plan, which contemplated particular remuneration to the promoters, in consideration of the transfer of shares which the promoters were to receive as part of their remuneration, and after the corporation's organization it completed a contract with the promoters for their services, without fraud, which was not so favorable to them as the remuneration contemplated by the plan of organization, the subscribers were thereby absolved from all liability to the promoters on their contracts with them.—Mildenberg v. James, 66 N. Y. Supp. 77, 31 Misc. Rep. 607.

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6. Liability to Corporation.

[a] (N. Y. Sup. 1898) A promoter, organizing a corporation to purchase land, cannot retain profits made from the sale, unknown to subscribers.—Improvement Co. v. Richter, 55 N. Y. Supp. 486, 26 Misc. Rep. 26.

[b] (Pa. Sup. 1868) T. contracted to buy an interest in two oil wells. Afterwards an oil company was incorporated, to which T. transferred his interest, the vendors in the meantime receiving and selling the oil. By agreement the vendors made the deal to the corporation, and dated it back to the date of the contract, agreeing to deliver T.'s share of the oil to the company. *Held*, that assumpsit in the name of the company for oil received by the vendors between the contract and the incorporation could be maintained.—Snow v. Oil Co., 59 Pa. 209.

[c] (Pa. Sup. 1874) Promoters, directors, or agents of a company are not permitted to make profit out of it in buying lands or dealing with it.—Appeal of Rice, 79 Pa. 168.

[d] (Va. Sup. 1895) The prospectus of a company, reciting that if the company take and hold certain lands it shall pay therefor "actual cost," *held* to mean that the company should pay for the lands the actual price paid to the owners thereof, excluding therefrom all profits to promoters received as commissions from the owners.—Land Co. v. Obenchain, 22 N. E. 876, 92 Va. 130.

[e] (Wis. Sup. 1889) A complaint alleged that defendants, having obtained the right to purchase a mining option for $20.000, proceeded to form a corporation to make such purchase, representing to the persons who subscribed for stock that the option would cost $90,000, and that, having first induced third persons to subscribe for the stock on such representations, and to pay to the corporation the sum of $10,000 for their stock, the corporation then, through defendants, its officers, purchased the option nominally for $90,000, paying the $20,000 which it actually cost them with the money received by the corporation from the sale of stock, and converting the remaining $70,000 to their own use. *Held*, that the fact that the $90,000 which the corporation paid defendants for the option were the proceeds of an issue of its stock in violation of the statute cannot be set up to defeat the recovery from defendants of the excess over the actual purchase price. Defendants are not in a position to attack either the issue of the stock or the legality of the corporate organization.—Mining Co. v. Spooner, 42 N. W. 259, 74 Wis. 307, 17 Am. St. Rep. 149.

[f] (Wis. Sup. 1889) It is immaterial that the sale and purchase were made at a time when defendants were the only members of the corporation, the stock not having been then actually allotted to the third persons, who were in reality interested in the formation of the corporation, and who had agreed to take the stock.—Mining Co. v. Spooner, 42 N. W. 259, 74 Wis. 307, 17 Am. St. Rep. 149.

[g] (Wis. Sup. 1898) Where a purchaser of real estate, after paying part of the price, and assuming obligations for the balance, organized a corporation, which was not thought of when he made the purchase, but for the purpose of taking the property off his hands at a price which was known to the other subscribers for stock, such corporation cannot complain that it was charged more for the property than the cost to the original purchaser, in the absence of false representations as to the value thereof.—Cold-Storage Co. v. Dexter, 74 N. W. 976, 99 Wis. 214, 40 L. R. A. 837.

[h] (Wis. Sup. 1898) One purchasing land in his own name, and paying therefor, and afterwards organizing a corporation, to which he offers to sell the property, does not thereby become an agent or trustee of the corporation.—Cold-Storage Co. v. Dexter, 74 N. W. 976, 99 Wis. 214, 40 L. R. A. 837.

7. —— Fiduciary Character of Relation.

[a] (U. S. C. C., Mass., 1887) B. and C., as promoters of a projected corporation, negotiated an agreement between the owners of certain patents and the corporation to be formed, by which B. and C. were to receive 3,750 shares of the capital stock of the new company, less 625 shares, which they were to assign to P. B. and C. offered the public an option to take stock in the new company, disclosing the purchase of the patents, and that a portion of the stock was to be issued to the former owners in part payment, but not

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informing purchasers that they were to have stock on any different terms or conditions. It was further agreed that B. should be president, and C. treasurer, of the corporation, and they were so elected, and placed a large amount of stock at seven dollars a share, obtaining their own stock for nothing. *Held* that, as promoters of the new company, they occupied a fiduciary relation towards it, and had no right to derive any advantage over other stockholders without a full and fair disclosure of the transaction, and that any secret profits made must be refunded to the company.—Chandler v. Bacon, 30 Fed. 538.

[b] (U. S. C. C., Mass., 1887) In such a case, the corporation has a right to elect (1) whether the shares should be transferred back to it; or (2) if the shares have been sold, their entire profits made by the sale should be turned over; or (3) that it should be paid the sum lost by reason of being deprived of the right to place such shares with other persons at seven dollars per share.—Chandler v. Bacon, 30 Fed. 538.

[c] (Mo. Sup. 1891) A person who secures an option on a property with a view to organizing a corporation, and selling the property to it, and who, together with another person employed by him, forms the company, and places the stock on representations that the property cost $2,000 more than it actually did, and also that certain notes would be included in the sale, but after the company is organized informs the stockholders that the notes were not included, though they were received by himself, is accountable to the corporation for the profits thus realized by himself, as he occupied a position of trust towards the subscribers, and could not make secret profits out of the transaction.—Land Co. v. Case, 16 S. W. 390, 104 Mo. 572.

[d] (Pa. Sup. 1869) The promoters of companies, such as oil companies, when they buy to form a company, and their purchases are taken by the company, cannot make profits on such sales. Their position is one of trust and confidence. And the estate of one who has thus bought and sold to the company, and is an apparent subscriber himself, is liable in equity to refund to the company the share of the profits received by him over the sum he paid.—Appeal of McElhenny, 61 Pa. 188; Simons v. Oil Co., 61 Pa. 202, 100 Am. Dec. 628.

[e] (Pa. Sup. 1870) Where persons form, or begin to form, an association, they stand in a confidential relation to each other and to all who may subsequently become members. They cannot purchase property for the purposes of the association, and then sell it to the company at an advanced price, without accounting for the profit.—Oil Co. v. Densmore, 64 Pa. 43.

[f] (Wis. Sup. 1889) A complaint alleged that defendants, having obtained the right to purchase a mining option for $20,000, proceeded to form a corporation to make such purchase, representing to the persons who subscribed for stock that the option would cost $90,000; and that, having first induced third persons to subscribe for the stock on such representations, and to pay to the corporation the sum of $100,000 for their stock, the corporation then, through defendants, its officers, purchased the option nominally for $90,000, paying the $20,000 which it actually cost them with the money received by the corporation from the sale of stock, and converting the remaining $70,000 to their own use. The action was brought, in the name of the corporation, to recover the $70,000. *Held*, that the complaint stated a good cause of action.—a case of trustees and agents of a corporation selling property to it on the one hand, and buying for it on the other, and making a profit for themselves by the transaction.—Mining Co. v. Spooner, 42 N. W. 259, 74 Wis. 307, 17 Am. St. Rep. 149.

8. —— Fraudulent Character of Transaction.

[a] Where a promoter made a fraudulent sale of land to a corporation, the fact that the sale was not fraudulent as to some of the stockholders is not a bar to an action by the corporation.

—(Mo. Sup. 1898) Exter v. Sawyer, 47 S. W. 951, 146 Mo. 302;

(N. Y. Sup. 1898) Improvement Co. v. Richter, 55 N. Y. Supp. 486, 26 Misc. Rep. 26.

[b] (U. S. C. C., Kan., 1887) T. and A., having, for a small sum, purchased a roadbed, the construction of which cost only $2,000, caused a railroad com-

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pany to be organized, and, with others, became directors thereof, and while in this relation contracted with the directors to sell the roadbed to the company for $200,000 cash or bonds, and $3,600,000 of the capital stock. The sale was formally ratified at a meeting of the directors, and entered on the records of the company; and afterwards the stockholders unanimously approved the purchase. At the time of the sale there were no stockholders, and the stock thus issued was all that had been subscribed. The company had no property except its charter and the roadbed, and the value of the notes and stock issued to T. and A. had no marketable value. *Held*, that the sale was not fraudulent.—Stewart v. Railroad Co., 41 Fed. 736.

[c] (Mass. Sup. 1900) Promoters of a corporation, subsequent to the creation thereof, and while they were the sole stockholders, voted to issue its corporate stock to themselves in payment for services rendered in securing options on land, which they assigned to the corporation. The stock so issued equaled the estimated profits to be derived from such options. Thereafter the promoters invited the public to subscribe to the stock, without disclosing the facts as to such stock to the subscribers, or getting their consent to the payment of such remuneration. *Held*, they are guilty of a fraud, and the company can, without returning the lands acquired under the options, maintain an action for the recovery of such stock, or damages for the loss thereof. —Hayward v. Leeson, 57 N. E. 656, 176 Mass. 310, 49 L. R. A. 725; Same v. Hopewell, Id.

[d] (Mo. Sup. 1898) Where one formed a company for the purpose of purchasing land on which he had previously procured a personal option and acted for it in making the purchase, concealing from the subscribers and directors that he had purchased the land at a much less sum than that at which he sold it to the company, he is liable to the company for the profits of the sale thus made to it.—Exter v. Sawyer, 47 S. W. 951, 146 Mo. 302.

[e] (Mo. App. 1898) A promoter may deal at arm's length with a corporation, and may sell it property at a profit, but he cannot do this by concealing the truth when it is his duty to speak, nor speculate off of it by misrepresenting his connection with, and interest in, the thing about which he is proposing to deal with the corporation, for the purpose of selling it his property.—Improvement Co. v. Webster, 75 Mo. App. 457.

[f] (Pa. Sup. 1874) A. and J. projected and organized a company, so that A. might sell his lands to the company, and J. build a railroad for them. They owned most of the stock, controlled the corporation absolutely, and co-operated with each other in selling the land and contracting for building the road. *Held*, that the burden was on them to show the fairness of the transactions, and, in the absence of such showing, that the sale of this land by A. to the company was fraud in fact and in law.—Appeal of Rice, 79 Pa. 168.

[g] (Wis. Sup. 1898) A prospectus for a corporation, which states, "Cost of ground, $40,000," is not a representation that that was the cost to a stockholder who proposed to turn the property over to the corporation.—Cold-Storage Co. v. Dexter, 74 N. W. 976, 99 Wis. 214, 40 L. R. A. 837.

[h] (Wis. Sup. 1898) The fact that a promoter of a corporation personally pays a commission to induce another to subscribe, or to procure other subscribers who would likely be valuable patrons of the business to be carried on, does not constitute a fraud upon the corporation, or the other subscribers to its capital stock.—Cold-Storage Co. v. Dexter, 74 N. W. 976, 99 Wis. 214, 40 L. R. A. 837.

[i] (Wis. Sup. 1900) Where persons owning land, which they had bought for $1,000 per acre, agreed to form a corporation, and transfer the land to it at $1,500 per acre, taking stock in payment, and thereafter, and before this was done, one of such persons sold an interest in his land to S. at $1,325 per acre, with the understanding that, when the property was turned over to the corporation, S., as well as the others, was to be compensated for his interest by shares of the corporation at the rate of $1,500 per acre, there is no liability of the promoters to the corporation for their profits in the sale, though the person selling to S. represented that the land had cost him $1,300 an acre; the fraud being personal to S., and perpetrated by his vendor alone, and the right of action belonging to S. individually.—Spaulding v. Town-Site Co., 81 N. W. 1064, 106 Wis. 481.

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9. —— Misstatements as to Amount of Stock Paid for.

[a] (Mo. Sup. 1899) In an action by an assignee of an insolvent corporation against incorporators, who constituted the first board of directors, to recover the difference between the amount of capital actually paid into the treasury and the amount stated in the articles to have been paid to the first board of directors, as required by Rev. St. 1889, § 2768, which provides that the articles shall set forth that one-half of the par value of the stock has been paid up in lawful money and is in the custody of the first board of directors, defendants are estopped from proving that a less amount than declared in the articles was paid, and that it was agreed they should do business on that amount.—Hequembourg v. Edwards, 50 S. W. 908.

[b] (Mo. Sup. 1899) An action by an assignee of a corporation against incorporators who constituted the first board of directors, to recover the difference between the amount of capital actually paid into the treasury and the amount stated in the articles as having been paid to the first board of directors, as required by Rev. St. 1889, § 2768, is not an action for conversion.—Hequembourg v. Edwards, 50 S. W. 908.

10. —— Extent of Liability.

[a] (La. Sup. 1888) Defendants were sued to deliver a list containing subscriptions of various persons to 800 shares of the stock of plaintiff corporation of the face value of $50 per share, and, in default of such delivery, for judgment condemning them to pay the value of said list. *Held*, that defendants' liability could not exceed an obligation to discharge the liabilities of the subscribers in accordance with the terms of their subscriptions, and that a judgment for $40,000 cash, where the subscriptions were on credit, and without reserving their right to receive the stock subscribed for, is manifestly insupportable.—Brewing Co. v. Babinger, 4 South. 82, 40 La. Ann. 277.

[b] (Mass. Sup. 1900) Persons who were promoters of a corporation, and who, while they were the sole stockholders, procured the issuance to themselves of shares of the capital stock of the corporation in payment of secret profits made by them from the sale of property owned by them to the corporation, may be compelled to account for the shares so received, with dividends thereon received by them, or the proceeds of a sale thereof by them, if sold, with interest from the date of the sale, or for the fair market value of the stock at the time of its issuance, or, if it had no market value at the time of issuance, for the reason that the corporation was not yet launched, then the value at the time a market value may be found to have been established.—Hayward v. Leeson, 57 N. E. 656, 176 Mass. 310, 49 L. R. A. 725; Same v. Hopewell, Id.

[c] (N. J. Sup. 1899) R. employed defendant to obtain options for the purchase of certain lands; defendant's compensation to be one-half of the profit realized on their sale. R., with defendant and others, organized a company to buy said lands. Defendant did not disclose to the company his agreement for compensation, and R. did not impart to it the prices named in his options. The company purchased the lands at a profit to R. *Held*, in a suit by the company, defendant must account for the profit he has made, but that a decree against him for the whole profit of the transaction was erroneous.—Land Co. v. Loudenslager. 43 Atl. 671, 58 N. J. Eq. 556, modifying (Ch. 1896) 35 Atl. 436, 55 N. J. Eq. 78.

11. —— Actions.

[a] (U. S. C. C., Mass., 1887) B. and C., as promoters of a projected corporation, negotiated an agreement between the owners of certain patents and the corporation to be formed by which B. and C. were to receive 3,750 shares of the capital stock of the new company, less 625 shares, which they were to assign to P. B. and C. offered the public an option to take stock in the new company, disclosing the purchase of the patents, and that a portion of the stock was to be issued to the former owners in part payment, but not informing purchasers that they were to have stock on any different terms or conditions. It was further agreed that B. should be president and C. treasurer of the corporation, and they were so elected, and placed a large

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amount of stock at $7 a share, obtaining their own stock for nothing. *Held*, that B. and C., as promoters of the new corporation, having signed the secret agreement as parties of the second part and acted in concert to promote a common purpose for their common benefit, became jointly and severally liable to account as partners, whatever may have been their private intention.—Chandler v. Bacon, 30 Fed. 538; Browne v. Printing Co., Id.

[b] (N. Y. Sup. 1898) Where a corporation sues a promoter to compel cancellation of a bond and mortgage given to him, on the ground that it represents the profits of a sale made to it, which he wrongfully retains, it is not objectionable as being an action to rescind a part of the contract of sale.—Improvement Co. v. Richter, 55 N. Y. Supp. 486, 26 Misc. Rep. 26.

[c] (N. Y. Sup. 1898) The burden is on a promoter, seeking to retain profits of a sale to the corporation, to show that his dealings were fair, and that he took no undue advantage of subscribers.—Improvement Co. v. Richter, 55 N. Y. Supp. 486, 26 Misc. Rep. 26.

[d] (N. Y. Sup. 1898) The corporation itself may sue a promoter for an accounting of profits of a sale to it wrongfully retained by him. Each subscriber is not bound to sue the promoter separately.—Improvement Co. v. Richter, 55 N. Y. Supp. 486, 26 Misc. Rep. 26.

[e] (Wis. Sup. 1900) Though after persons had formed a corporation, and turned over to it, at $1,500 per acre, land which had cost them $1,000 per acre, one of them, in selling his shares of the stock, which were taken in payment for the land, represented that the land had been turned over to the corporation at what it had cost the promoters, no right of action thereby accrues to the corporation.—Spaulding v. Town-Site Co., 81 N. W. 1064, 106 Wis. 481.

12. Liability to Stockholders.

[a] (Ariz. Sup. 1888) Property was conveyed to defendant in trust to organize a joint-stock company. The grantors were to receive, in consideration, a proportion of the stock after a certain amount had been set apart for working capital. *Held*, that defendant held the stock subsequently received by him in trust for such grantors.—Philes v. Hickies, 18 Pac. 595.

[b] (Cal. Sup. 1894) Promoters of a corporation, who falsely represent that the price paid by the corporation for property conveyed by them to the corporation is the cost thereof to themselves, are liable to the stockholders for their profits in the transaction, though the property is worth the amount paid by the corporation.—Burbank v. Dennis, 35 Pac. 444, 101 Cal. 90.

[c] (Mass. Sup. 1899) In an action against promoters for fraud in the sale of stock, defendants testified that they put certain of their own money into the company's safe, and had spent it for rent, tools, and expenses in behalf of the company, and asked a charge that, if this was used with the intention that it should be applied to the payment of stock, then it was not a liability of the company. *Held* properly refused, the question whether anything was done which was intended as a payment or amounting to a bona fide renunciation of control over the money, except through the company, being omitted from the request.—Honsucle v. Ruffin, 52 N. E. 538, 172 Mass. 420.

[d] (Mo. Sup. 1883) Where several persons engage in business jointly, and use a corporate name and issue stock, and, in the promotion of the scheme, false representations are made, by those holding themselves out as promoters and managers of the business, as to the material facts of inducement and as to matters peculiarly within the knowledge of all the associates or their agents, all those engaged in the promotion of the business as associates of those making the false representations are liable to those who, relying on such representations, purchase stock to their hurt.—Hornblower v. Crandall, 78 Mo. 581; Whiting v. Same, Id. 593.

[e] (Mo. Sup. 1883) Where several persons engage in business jointly, and use a corporate name and issue stock, and, in the promotion of the scheme, false representations are made as to the material facts of inducement and as to matters within the knowledge of all the associates, the fact that one of the associates thus connected is ignorant of the details of the business will not excuse him from liability to those who, relying on such representations, purchase stock, where he had means of knowing, but trusted to his

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associates, and where he, with the others, received the benefit of the wrongdoing.—Hornblower v. Crandall, 78 Mo. 581; Whiting v. Same, Id. 593.

[f] (N. Y. App. 1873) Promoters of a corporation, who obtain subscriptions to the capital stock by misrepresentations as to the value of land which they are to transfer to the corporation, and by fictitious subscriptions, and who, on the organization of the company and payment of the subscriptions of the bona fide subscribers, divide the proceeds among themselves, are liable for the fraud.—Getty v. Devlin, 54 N. Y. 403.

[g] (N. Y. App. 1873) Four persons owning land valued at $30,000 agreed to organize a corporation, and to transfer the lands to it, and commenced to solicit stock subscriptions to the proposed corporation which designated the property as being worth $125,000. They caused fictitious subscriptions to the extent of half the capital to be subscribed, which were never intended to be paid, and marked them as having been paid. *Held*, that a person subscribing to the stock of the corporation was entitled to recover the amount of his subscription from such four persons, where they received the money and divided it between themselves.—Getty v. Devlin, 54 N. Y. 403.

[h] (N. Y. App. 1890) The promoters of a mining company, having secured an option on certain mines, issued a prospectus inviting subscriptions to a corporation about to be formed to acquire title to the mines, the stock of which was to be divided into 150,000 shares, of $10 each, a limited number of which were offered to the subscribers at $4 each, and further stating that the promoters themselves were to be the first officers and trustees of the company. They sold 61,000 shares, and with the proceeds thereof paid for the property, and then completed the organization and issued the stock. After distributing the shares subscribed for, and those given to brokers and others to advance the scheme, there remained 58,235 shares, which the promoters divided among themselves in proportion to their respective interests in the undertaking, and for which they paid nothing. *Held*, that the relation of vendor and vendee did not exist between the promoters and the subscribers, but that, because of their concealment of the fact that the purchase was wholly at the expense and risk of the latter, they stood in the relation of trustees to them, and were liable for the damages sustained.—Brewster v. Hatch, 25 N. E. 505, 122 N. Y. 349, 19 Am. St. Rep. 498.

[i] (N. Y. App. 1899) Plaintiff and defendant, partners, being unable to agree in the management of their business, formed a corporation, it being expressly agreed that defendant, who was manager of the business, should have a controlling interest. A promoters' agreement was executed, providing that defendant was "to take, own, and hold" 1,000 shares, plaintiff 998 shares, and a third person the remaining 2 shares; the profits to be divided equally between plaintiff and defendant. The agreement also provided that defendant, "if he shall at any time sell or assign 998 shares of his said stock, then and in such case he will, without any consideration for the same, transfer the other 2 shares of his said stock" to plaintiff. *Held*, that the last provision did not prevent defendant from selling portions of his stock less than 998 shares, without transferring the 2 shares to plaintiff.—Burden v. Burden, 54 N. E. 17, 159 N. Y. 287, affirming (Sup. 1896) 40 N. Y. Supp. 499, 8 App. Div. 160.

[j] (Pa. Sup. 1881) In the absence of fraudulent representations to their associates, the owners of property of any kind forming an association with others may sell the property to the association at any price agreed on between them, no matter what it may have cost; there is no confidential relation between the parties, and they are not bound to disclose the profits realized in the transaction.—Lungren v. Pennell, 10 Wkly. Notes Cas. 297.

[k] (Pa. D. C. 1867) A stockholder cannot maintain an action in his own name, for fraud and deceit, against the projectors of a company.—McAleer v. McMurray, 6 Phila. 244.

[l] (Wis. Sup. 1897) Where the promoters of a corporation to buy land as an investment have already acquired the privilege of buying the land at a much lower figure than that represented to their associates, and after the formation of the corporation procure a conveyance to the corporation, and fraudulently appropriate the difference between the actual and ostensible purchase prices, an innocent subscriber to the corporate stock cannot, on

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tendering his stock to the promoters, recover from them the amount paid on it, since he cannot place them in their former position, the land having been conveyed to the corporation, and thereby placed beyond the subscriber's control.—Franey v. Warner, 71 N. W. 81, 96 Wis. 222.

[m] (Wis. Sup. 1897) A subscriber to the stock of a corporation may in equity require an accounting by the promoters, and recover a pro rata part of the profits retained by them in the purchase of property for the corporation.—Franey v. Warner, 71 N. W. 81, 96 Wis. 222.

[n] (Wis. Sup. 1897) In a suit by stockholders to rescind a sale of real estate on the ground of fraud, and to recover of the promoters of the corporation profits fraudulently made by them in such transaction, it appeared that such promoters, who had obtained the right to purchase a certain tract of land for $31,000, induced plaintiffs to join them in forming a corporation for the purchase thereof at $55,000, by representing that it was a mutual enterprise, in which the several stockholders, including themselves, were on an equal footing in all respects, but with the secret understanding between themselves that they should appropriate the difference between such sums to their own use, as their profits in such transaction, and that on the organization of such corporation they procured themselves to be elected directors and managing officers, and the purchase of the land in question to be consummated, ostensibly for $55,000, but really for $31,000, secretly appropriating the difference remaining to their own use. *Held* sufficient to support findings entitling plaintiffs to the relief prayed.—Hebgen v. Koeffler, 72 N. W. 745, 97 Wis. 313.

13. Liability to Third Persons.

[a] (Colo. App. 1896) Where an attorney is employed, by individuals seeking to incorporate, to prepare the incorporation papers, and is authorized to contract for printing, the promoters of the corporation are personally liable for such contract made preliminary to organization.—Hersey v. Tully, 44 Pac. 854, 8 Colo. App. 110.

[b] (Kan. App. 1895) Where promoters of a corporation procure a charter, and are named as directors therein, and as such elect themselves officers of the organization, but no bona fide subscription of stock is made, nor arrangements entered into for the payment of debts by the organization, they are liable personally for a debt, incurred by one elected by them superintendent and general manager, for materials used in carrying on the business of the organization.—Whetstone v. Manufacturing Co., 41 Pac. 211, 1 Kan. App. 320.

[c] (Kan. App. 1895) In an action against promoters of a corporation, who procured a charter, but made no bona fide subscription of stock, on a debt incurred by one authorized by them to incur the same, the defendants were not improperly joined, though different acts on the part of each were alleged as establishing his liability in conjunction with the others.—Whetstone v. Manufacturing Co., 41 Pac. 211, 1 Kan. App. 320.

[d] (La. Sup. 1875) Where purchasers of the assets and franchises of a corporation issued bonds before organizing themselves as a new corporation, they are jointly and severally liable thereon as individual obligors, notwithstanding they used the name of the old corporation in issuing them.—Chaffe v. Ludeling, 27 La. Ann. 607.

[e] (La. Sup. 1875) Purchasers of the property and franchises of a corporation, who failed to create a new corporation, are not entitled to claim freedom from individual liability for debts contracted by them.—Chaffe v. Ludeling, 27 La. Ann. 607.

[f] (Mo. Sup. 1895) On an issue as to defendants' liability for goods sold, it appeared that they joined together to establish a theater, and appointed a trustee to act for them and to control the funds; that they then attempted to organize a corporation, and held directors' meetings, but that the articles were defective, and no certificate was ever issued to them; that the goods sued for were sold under a bid made to one defendant individually, and accepted with his knowledge by the other three defendants, who acted for all; that the contract declared on was then made by the trustee for defendants; and that thereafter the old articles were abandoned, and a new corporation properly organized, which thereupon acquired the theater property,

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including the goods in suit. *Held* that, though the new corporation adopted the contract for the goods, defendants were liable thereunder individually.—Carpet Co. v. Crawford, 30 S. W. 163, 127 Mo. 356.

[g] (N. Y. App. 1871) Where stockholders in a manufacturing corporation, on the expiration of its charter, agree to continue business, and appoint one of their own members as agent with managing powers, and further agree to furnish money, when called on by such agent, to carry on the business, in proportion to the amount of stock held by each in the old corporation, they are liable as partners as to third persons for debts contracted by their agent in carrying on the business.—Bank v. Landon, 45 N. Y. 410.

[h] (N. Y. App. 1871) Stockholders in a manufacturing corporation, on the expiration of its charter, agreed to continue the business, and appointed one of their own members as agent with managing powers, and further agreed to furnish money when called on by such agent to carry on the business, in proportion to the amount of stock held by each in the old corporation. Commercial paper for the benefit of the firm was made by such agent signing the name of the old corporation by himself as agent. *Held*, that all the members of the association were liable on such paper to its full amount, it appearing that it was understood that the business was to be carried on in the name used in signing the note.—Bank v. Landon, 45 N. Y. 410.

[i] (N. Y. Sup. 1810) The deacons and elders of a church not incorporated called the plaintiff as their minister, and entered into an agreement with him for a stipulated yearly salary, which he regularly received from the deacons and elders for the time being, both before and after the church was incorporated, without ever looking to the individuals with whom he made the agreement for payment of his salary; and when the church was incorporated he was a party to the act of incorporation, and had afterwards frequently recognized it as a corporation. On being dismissed, he brought an action against the surviving parties to the original contract in their individual capacity. *Held*, that by the mutual understanding of the parties the original contract was waived, and that after the incorporation of the church the previous contract became extinguished as a private and simple contract; and, the corporation, acting by their seal, having assumed the contract and become the debtor of the plaintiff with his assent and concurrence, the defendants were not responsible to him in their individual capacity.—Van Vlieden v. Welles, 6 Johns. 85.

[j] (N. Y. Sup. 1897) Defendants were owners and operators of a steamboat, and plaintiff attended to the advertising of it. After they sold the steamer to a corporation, of which they themselves were the sole stockholders, plaintiff, without notice of the change, other than the knowledge of the change of name, continued the advertising under the previous arrangement. *Held*, that defendants were individually liable for such advertising.—Tobias v. Wierck, 48 N. Y. Supp. 146, 21 Misc. Rep. 763.

[k] (N. Y. Super. Ct. 1858) A party who projects a joint-stock company, and causes books to be opened, and allows an inscription of a person as owner of an interest to a definite amount, which is false within his knowledge, and embodies such false statement in a certificate signed by himself, accompanying such certificate with a written power authorizing a transfer by the party to whom it is given, and by such representation induces innocent parties to advance money thereon, is liable in damages in an action for deceit, brought by an innocent party who purchased shares of stock on the faith of such representations.—Cross v. Sackett, 6 Abb. Prac. 247.

[l] (Ohio Sup. 1900) The liability of the incorporators, under Rev. St. § 3244, is for the amount of any deficiency in the actual payment of 10 per cent. of the authorized capital stock of the corporation at the time of their certifying, as therein provided, to the secretary of state, and not merely for one-tenth of that amount.—Hessler v. Shear-Works Co., 56 N. E. 469, 61 Ohio St. 621.

[m] (Ohio Sup. 1900) In a suit to enforce the liability of incorporators, the court may, in its discretion, allow reasonable attorney's fees to counsel for plaintiff, and order the same to be paid out of the fund recovered.—Hessler v. Shear-Works Co., 56 N. E. 469, 61 Ohio St. 621.

[n] (Ohio Sup. 1900) Rev. St. § 3244, making incorporators liable to the

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amount of any deficiency in the actual payment of 10 per cent. at the time of certifying that such an amount had been subscribed, is intended as a security for the creditors of the corporation, in addition to the liability of the stockholders; and it is not necessary, to entitle a creditor to its benefit, that he should have knowledge of the making of the certificate or its contents.—Hessler v. Shear-Works Co., 56 N. E. 469, 61 Ohio St. 621.

[o] (Ohio Sup. 1900) Suit to enforce the liability of the incorporators should be prosecuted for the benefit of all the creditors, as in cases against the stockholders, and the liabilities of both classes may be enforced in the same action.—Hessler v. Shear-Works Co., 56 N. E. 469, 61 Ohio St. 621.

[p] (Pa. Sup. 1889) The owners of land whereon the building was erected were the incorporators of a company soon after chartered. Just before the charter issued, it was agreed among them that the contract for the building should be let to one of their number at a fixed sum, who should sublet it for less, the expense of building and profits to be divided among them in the ratio of the stock held. This was done, and the price of the building paid in shares issued to each. *Held*, that they were all liable as joint contractors to a material man furnishing supplies on the order of the subcontractor.—McFall v. Ice Co., 16 Atl. 478, 123 Pa. 259, 23 Wkly. Notes Cas. 146.

[q] (Tenn. Sup. 1894) Plaintiff gave L. an option for the purchase of land, and agreed to convey it to him or his indorsee on payment, within a certain time, of an amount in cash, reserving a vendor's lien for the balance. Several persons, with no distinct agreement as to who should ultimately be the purchaser, furnished L. the money with which the cash payment was made, and later agreed to form a corporation, which should become the purchaser. The corporation was formed, and L. assigned his option to it, and plaintiff executed to it a deed, and took its notes for the balance. On default, plaintiff had judgment to enforce the vendor's lien. *Held*, that the incorporators were not personally liable as partners for the balance due after the proceeds of the sale had been applied.—Shields v. Land Co., 28 S. W. 668, 94 Tenn. 123, 26 L. R. A. 509, 45 Am. St. Rep. 700.

[r] (Tex. Civ. App. 1897) The promoters are released when the second party accepts a new contract from the company after its organization.—Cotton-Oil Co. v. Burks, 39 S. W. 966.

[s] (Tex. Civ. App. 1897) Where the promoters of a company which they intend to organize contract in the name of such company, they are personally bound, unless there is a negative agreement.—Cotton-Oil Co. v. Burks, 39 S. W. 966.

[t] (Utah Sup. 1892) Where, prior to the incorporation of a bank, its cashier issues a certificate of deposit, the promoters and subsequent officers of the bank, other than the cashier, are not liable on the certificate, in the absence of proof of fraud or participation in the transaction.—Long v. Bank, 29 Pac. 878, 8 Utah, 104.

[u] (Wis. Sup. 1897) Until the "filing" of the certificate of organization and a copy of the constitution in the office of the register of deeds, the organizers of such society, having no legal right to act as a corporation, are liable as co-partners for its debts.—Bergeron v. Hobbs, 71 N. W. 1056, 96 Wis. 641, 65 Am. St. Rep. 85.

(107 Fed. 697.)

LARKIN v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. April 9, 1901.)

No. 755.

1. FRAUDULENT USE OF MAILS—INDICTMENT—REQUISITES—NAMES OF PERSONS INTENDED TO BE DEFRAUDED.

An indictment for a fraudulent use of the mails, in violation of Rev. St. § 5480, as amended by Act March 2, 1889 (1 Supp. Rev. St. p. 694), not charging a scheme to defraud the public generally, or a class not capable of being resolved into individuals, but clearly importing an intention to

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defraud definite individuals, is bad, if it does not describe them by name, or give a good and true reason for the omission.

2. SAME—SUFFICIENCY.

Such an indictment, stating the names of persons to whom letters or postal cards were addressed, does not satisfy the requirement that the names of parties intended to be defrauded must be alleged if it is not alleged that the scheme to defraud included them, as use of the mail for communication with a person intended to be injured is not essential to the offense, it being within the statute, if, in aid of the scheme to defraud, the mails be used to open correspondence with the intended victim, or "any person," or to incite "such other person [the one intended to be defrauded], or any person," to open communication with the designer of the scheme.

In Error to the District Court of the United States for the Northern Division of the Northern District of Illinois.

The plaintiff in error was convicted of a fraudulent use of the mails, in violation of section 5480 of the Revised Statutes, as amended by Act March 2, 1889 (1 Supp. Rev. St. p. 694), which, in so far as now pertinent, reads as follows: "If any person having devised or intending to devise any scheme or artifice to defraud * * * to be effected by either opening or intending to open correspondence or communication with any person, whether resident within or outside the United States, by means of the post-office establishment of the United States, or by inciting such other person or any person to open communication with the person so devising or intending shall, in and for executing such scheme or artifice or attempting so to do, place or cause to be placed any letter, packet, writing, circular, pamphlet or advertisement in any post-office, branch post-office, or street or hotel letter-box of the United States, to be sent or delivered by the said post-office establishment, or shall take or receive any such therefrom, such person so misusing the post-office establishment shall, upon conviction, be punishable by a fine of not more than $500 and by imprisonment for not more than eighteen months, or by both such punishments at the discretion of the court."

The body of the indictment on which the conviction was had reads as follows:

"The grand jurors for the United States of America, inquiring for the Northern division of the Northern district of Illinois, upon their oath present that Patrick Larkin, late of the city of Chicago, in the said division and district, before and at the several times of committing of the several offenses hereinafter mentioned, at Chicago aforesaid, in the division and district aforesaid, had devised a scheme and artifice to defraud divers other persons then resident within the said United States, by inducing those persons, respectively, to send to him divers valuable articles of merchandise on credit, under the pretense on his part that he would buy the same and give good security for the payment of his indebtedness therefor, but merely intending thereby, and by giving fictitious security, to get possession of such articles as should be so sent to him, the said Patrick Larkin, and fraudulently to convert the same to his own use, and sell and dispose of the same, and intending not to pay for the same, and to defraud thereof the several persons who should so send the same; which said scheme and artifice was a scheme and artifice which he, the said Patrick Larkin, when so devising the same as aforesaid and committing the offense hereinafter mentioned, intended to effect by opening correspondence and communication, by means of the post-office establishment of the said United States, with the several persons so intended to be defrauded, and by inciting those persons to open communication with him, the said Patrick Larkin, by means of the said post-office establishment. And the grand jurors aforesaid, upon their oath aforesaid, do further present that the said Patrick Larkin, on the eighth day of June, in the year eighteen hundred and ninety-eight, at Chicago aforesaid, in the division and district aforesaid, so having devised the said scheme and artifice in and for executing the same, and attempting so to do, unlawfully did place in the post office of the said United States there, to be sent and delivered by the said post-office establishment, a certain writing, to wit, a writing of the tenor fol-

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lowing, that is to say: 'Chicago, June 8th '98. I Allen Larkin state that I am the owner in fee simple of the following described property situated in the City of Chicago Co of Cook and State of Illinois. Three two story and basement modern brick residence buildings known as numbers 530, 534 and 536 Cornelia Ave, Chicago, worth eighteen thousand dollars,'—signed 'Allen Larkin,' directed to certain persons then doing business at South Bend, in the state of Indiana, under the name of Winkler Brothers, as manufacturers of and dealers in sprinkling carts; against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided.

"(2) And the grand jurors aforesaid, upon their oath aforesaid, do further present that the said Patrick Larkin, on the twenty-third day of June, in the year eighteen hundred and ninety-eight, at Chicago aforesaid, in the division and district aforesaid, so having devised the scheme and artifice to defraud described in the first count of this indictment, in and for executing the same and attempting so to do, unlawfully did place in the post office of the said United States, at Chicago aforesaid, to be sent and delivered by the said post-office establishment, a certain other writing, to wit, a writing on a postal card, of the tenor which here follows; that is to say: '532 Cornelia Ave Lake View Chicago June 23 Sirs Please send me your catalogue & prices of wind mills & oblige, Yours respt. P. Larkin,'—which said postal card then bore on the address side thereof the following direction and address, to wit: 'Phelps & Bigelow Wind Mill Co Kalamazoo Michigan,' against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

"(3) And the grand jurors aforesaid, upon their oath aforesaid, do further present, that the said Patrick Larkin, on the sixth day of August, in the year eighteen hundred and ninety-eight, at Chicago aforesaid, in the division and district aforesaid, so having devised the scheme and artifice to defraud in the first count of this indictment described in and for executing the same, and in attempting so to do, unlawfully did place in the post office of the said United States at Chicago aforesaid, to be sent and delivered by the said post-office establishment, a certain other writing, to wit, a writing upon a postal card, of the tenor following; that is to say: '532 Cornelia Avenue Lake View Chicago Aug 6 1898 Sir Please send me your colour card and prices of your mixed paints Yours respt P. Larkin,'—which last mentioned postal card then bore on the address side thereof the following direction and address, to wit: 'C. H. Parker Esq. Paint Mfr Valpairaiso Porter Co Indiana;' against the peace and dignity of the said United States, and contrary to the form of the statute of the same in such case made and provided."

The sufficiency of the indictment, and of each count, was challenged by demurrer on several grounds; that chiefly relied on being that the names of the persons intended to be defrauded are not set out, and no sufficient reason given for the omission.

Joseph B. David, for plaintiff in error.

Charles B. Morrison, for defendant in error.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

The indictment in this case, it is to be observed, does not charge a scheme to defraud the public generally, or to defraud a class not capable of being resolved into individuals. So charged, it would be evident that the persons intended to be injured were not known, and there could, of course, be no necessity for an averment to that effect. The scheme alleged in this indictment was "to defraud divers other persons * * * by inducing those persons severally to send to him divers valuable articles, * * * and to defraud thereof

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the several persons who should so send the same, * * * a scheme and artifice which he * * * intended to effect by opening correspondence and communication * * * with the several persons so intended to be defrauded, and by inciting those persons to open communication with him." These expressions clearly import an intention to defraud definite individuals, with whom it was intended to open correspondence, and who, therefore, by the settled rule of pleading, should have been described by name in the indictment, or a good and true reason given for the omission. King v. Reg., 7 Q. B. 806; Com. v. Andrews, 132 Mass. 263; People v. Arnold, 46 Mich. 268, 9 N. W. 406; Moore v. State, 65 Ind. 213; U. S. v. Hess, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516; Durland v. U. S., 161 U. S. 306, 16 Sup. Ct. 508, 40 L. Ed. 709; State v. Woodson, 5 Humph. 55; Murphy v. State, 24 Miss. 590; White v. Reg., 13 Cox, Cr. Cas. 318; 1 Chit. Cr. Law, 210; 2 Hawk. P. C. 319; Clark, Cr. Proc. § 94; Starkie, Cr. Pl. 188.

In respect to the rule that the persons intended to be injured should be named in an indictment, a scheme to defraud by means of correspondence through the mails is not essentially different from a conspiracy to defraud at common law. Touching the latter, the rule is thus stated in 2 Whart. Cr. Law, § 1396:

"It is essential to set forth the names of the parties to be injured if they are capable of definite ascertainment, unless a good reason be given for their nonspecification. * * * Where, therefore, the persons to be injured were defined at the time of the conspiracy, and ascertainable by the pleader, their names should be specified in the indictment. Where, however, the conspiracy was to defraud a class not capable of being at the time resolved into individuals, or to defraud the public generally, then the specification of names is impracticable, and hence unnecessary."

See, also, Whart. Cr. Pl. §§ 109–113, and authorities cited in the notes.

In U. S. v. Hess, supra, the indictment, brought like the one before us, under section 5480 of the Revised Statutes, without describing the scheme, charged the defendant with "having devised a scheme to defraud divers other persons to the grand jurors unknown," which he "intended to effect by inciting such other persons to open communication with him," etc.; and, in response to the contention that it was enough that the indictment should follow the language of the statute, the court said:

"The general, and, with few exceptions, of which the present is not one, the universal, rule on this subject is that all the material facts and circumstances embraced in the definition of the offense must be stated, or the indictment will be defective. * * * The statute is directed against 'devising or intending to devise any scheme or artifice to defraud,' to be effected by communication through the post office. As a foundation of the charge, a scheme or artifice to defraud must be stated, which the accused either devised or intended to devise, with all such particulars as are essential to constitute the scheme or artifice, and to acquaint him with what he must meet on the trial. * * * Assuming that this averment of 'having devised' the scheme may be taken as sufficiently direct and positive, the absence of all particulars of the alleged scheme renders the count as defective as would be an indictment for larceny without stating the property stolen or its owner or party from whose possession it was taken. The doctrine invoked by the solicitor general, that it is sufficient, in an indictment upon a statute, to set forth the offense in the words of the statute, does not meet the difficulty here. Undoubtedly the lan-

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guage of the statute may be used in the general description of an offense, but it must be accompanied with such statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description with which he is charged."

The opinion in Durland v. U. S. is more explicitly in point. The indictment in that case was also for a violation of section 5480 of the Revised Statutes, and charged that the defendant, by means described, devised "a scheme and artifice to defraud; that is to say, by divers false pretenses and subtle means and devices to obtain and acquire for himself, of and from divers persons to this grand inquest unknown, a large sum of money, to wit, the sum of fifty dollars each, and to cheat and defraud each of said divers persons thereof by then and there representing," etc.; and that "in and for executing such scheme * * * he did place and cause to be placed in a post office of the United States at Philadelphia, to be sent and delivered by the said post-office establishment, divers letters and packets, to wit, twenty letters and circulars, directed, respectively, to the said divers persons, the names and addresses of whom are to this grand inquest unknown, contrary," etc. It will be observed that the "said divers persons" to whom the letters and circulars were, respectively, addressed, are shown, by force of the word "said," to have been the persons intended to be defrauded, and to the objection that the names and addresses should have been stated the court said: "The omission to state the names of the parties intended to be defrauded, and the names and addresses on the letters, is satisfied by the allegation, if true, that such names and addresses are to the grand jurors unknown." Later in the opinion it was said, "as to the contents or import" of the letters, that, "if the defendant had desired further specification and identification, he should have secured it by demanding a bill of particulars"; but this, having reference only to a further identification of the letters, which for the purpose of defining the offense intended to be charged had already been sufficiently identified, does not, we think, affect the force of the passage quoted as a distinct recognition of the doctrine that when practicable the names of the parties intended to be defrauded must be stated as a part of the description of the offense, and that an averment that the names were unknown, in order to excuse the omission, must be true. If such averment were unnecessary, and could be rejected as surplusage, it would be immaterial whether it were true or false. The names of the persons to whom the letters were addressed would, of course, have tended to identify the letters, and for that purpose merely the names might doubtless have been supplied by a bill of particulars, but that does not affect the rule that for the purpose of describing and defining the offense itself—not merely to identify more fully another circumstance connected therewith—the names of those injured or intended to be injured, if known, must be stated. The first count of this indictment sets out a letter, which, it is alleged, was "directed to certain persons then doing business at South Bend, in the state of Indiana, under the name of Winkler Bros." This is not an averment that the letter was addressed to Winkler Bros. The names of the per-

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sons composing that firm are not given, and it is not alleged that the scheme to defraud included them, or that the letter was sent for the purpose of defrauding them. If, therefore, their names had been set out, the requirement that the names of parties intended to be injured be alleged would not have been satisfied. It is not essential to the offense defined that there be a use of the mail for communication with the person intended to be injured. It is within the statute if, in aid of the scheme to defraud, the mails be used to open correspondence with the intended victim, or "any person," or to incite "such other person [the one intended to be defrauded], or any person," to open communication with the designer of the scheme. In the second and third counts, too, it is not alleged that the Phelps & Bigelow Wind-Mill Company and C. H. Parker, to whom the postal cards set out in those counts were directed, were intended to be affected by the alleged scheme; and it is not shown whether the Phelps & Bigelow Wind-Mill Company was a co-partnership or a corporation. On that point, see Wharton, Cr. Pl. § 110. Other questions need not be considered. The judgment below is reversed, and the cause remanded, with directions to sustain the demurrer to each count of the indictment.

(107 Fed. 711.)

THOMSON-HOUSTON ELECTRIC CO. v. LORAIN STEEL CO.

(Circuit Court of Appeals, Second Circuit. February 27, 1901.)

No. 99.

PATENTS—CONSTRUCTION AND VALIDITY—ELECTRIC MOTOR REGULATORS.

The Knight patent, No. 428,169, for an electro-motor regulator, which describes a device for use on that class of electric motors in which the reverser and the regulator are operated by separate levers, and consists of an interlocking mechanism connecting the two levers which prevents the movement of either except when the other is in a predetermined position, is not for a pioneer invention, but for an improvement only, in that class of motors, and must be limited in construction to substantially the device shown. The first four claims, which by their claims cover broadly any interlocking device for co-ordinating the two levers, are void in view of the prior art, which discloses such mechanism used for interlocking of the levers for operating railroad switches and signals, and the invention of the patentee is measured by the novelty of the particular device by which he applied the same principle to the levers of an electric motor.

Appeal from the Circuit Court of the United States for the Southern District of New York.

For opinion of trial court, see 103 Fed. 641.

Frank S. Busser, for appellant.

F. H. Betts, for appellee.

Before WALLACE and LACOMBE, Circuit Judges.

WALLACE, Circuit Judge. This is an appeal from a decree adjudging the validity, and infringement by the defendant, of claims

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1, 2, 3, and 4 of letters patent No. 428,169, dated May 20, 1890, issued to Walter H. Knight, for an "electro-motor regulator."

The patent relates to the controller apparatus of motors used on electric railway cars and working on a circuit of constant potential, in which the regulator governing the speed and the reverser governing the direction of the car are operated by the manipulation of the motorman. In such apparatus the office of the regulator is to introduce resistance in the circuit for turning the current off and on and varying it from minimum to maximum strength, and the office of the reverser is to vary the direction of the current through one element of the motor. The invention which is the subject of the patent consists in improvements in the controller apparatus of that class of these motors in which the reverser and the regulator are operated by separate levers.

As is pointed out by the patentee in the general statement of the nature and object of his invention, in motors working on a circuit of constant potential, such as are employed for electric railways—

"It is essential that a resistance or other device for opposing the electromotive force should be inserted in the circuit whenever the motor is at rest or its counter electro-motive force substantially diminished. Since a reversal of the motor of course reverses its counter electro-motive force, it is essential that it should only be reversed when the motor is at rest, and when there is substantially no current passing through it. A sudden reversal of the motor when in operation so affects the counter electro-motive force that, unless a resistance is inserted, the sudden flow of current which ensues is so great as to burn out the machine. Moreover, when the reversing device is a switch controlling the direction of the current in either the field magnet or armature, it is apt to be injured by operating it while the current is passing."

The object of the invention is to prevent reversal of the motor at an improper time, and also the operation of the regulator unless the reversing mechanism is set in one direction or the other. The gist of the invention is stated by the patentee in his specification as follows:

"My invention consists in providing a reversing mechanism for the motor with a stop or lock so that it can be operated only when there is a sufficient amount of resistance inserted to prevent injury, and it furthermore consists in providing a stop or lock for the resistance controller or regulator of the machine by which, when the reversing mechanism is at the neutral point, the resistance cannot be cut out. These devices absolutely prevent reversal of the motor at an improper time, and also the operation of the regulator unless the reversing mechanism is set in one direction or the other."

The specification describes the ordinary controller having a reverser and a regulator, each of which is actuated by its own lever or handle, the movement of the regulator handle varying the strength of the current, and the movement of the reverser handle varying the direction of the current. The two levers are joined by a connecting rod pivoted to a triangular shaped block having two projecting pins standing, when the reversing lever is at its central position, in a gap in a flange formed in a sector on the lower side of the regulating lever. Thus, when the reversing lever is in its central position, the motor having no tendency either forward or backward, it is impossible to move the regulator by reason of the flange striking the pins. When, however, the reversing lever is thrown to one

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side of the central position, the triangular block is turned, and assumes a position accordingly. But, whether the lever is moved to the left or to the right, one of the pins is turned to the inside of the flange and the other to the outside of the flange, so that the regulator can be turned, the flange passing between the two pins without interference. Conversely, when the regulating lever has been turned so as to interpose the flange between the two pins, the engagement of the flange with the pins will not allow the triangular block to be turned by a push or pull on the connecting rod, and consequently the reversing lever is locked. From this description it is obvious that the interlocking mechanism is so devised as to make it impossible to move the reversing lever except when the regulator lever is at its "off" position, or to move the regulating lever unless the reversing lever is set for one definite movement of the car. Consequently, the motorman, in order to reverse, is required not only to operate the reversing lever, but is compelled to bring the regulating lever back to its "off" position before the other can be moved; and conversely he cannot operate his regulating lever until his reversing lever has been moved from the intermediate position to the one side or the other. The claims of the patent are as follows:

"(1) The combination, with an electric motor, of a reversing device and regulator therefor, means for operating the same, and a stop for the reversing device, controlled by the regulator, whereby the reversing device can be operated only when the regulator is in a predetermined position.

"(2) The combination, with an electric motor, of a reversing device therefor, a regulator, a stop for the reversing device, controlled by the regulator and locking the reversing device, so as to prevent its being operated except when the regulator is substantially at the point of maximum control.

"(3) The combination, with an electric motor, of a regulator therefor, a stop or lock for the regulator, and a reversing device for the motor connected to said stop, whereby the said stop is operated by the reversing device to lock the regulator against movement, except when the reversing device is in a predetermined position.

"(4) The combination, with an electric motor on a constant-potential circuit, of a regulator and reversing device therefor, operated independently of one another, and an intermediate stop or lock connection, whereby the regulator and reversing device each controls the movement of the other.

"(5) The combination, with an electric motor on a constant-potential circuit, of a reversing lever therefor, a regulating lever, a flanged segment on the regulator lever, a pivoted block having stops engaging with the flange of the segment, and a connection therefrom to the reversing lever, substantially as described."

The court below was of the opinion that as the patentee was the first to devise an electric motor having a reverser and regulator manipulated by separate handles, in combination with a stop or lock so constructed and arranged as to leave both the reverser and the regulator free to be operated independently of the other, but to compel the alternate manipulation of each, the claims were valid, and were entitled to a sufficiently broad construction to include every combination or device effecting the same result by substantially the same means.

The patent undoubtedly describes new means for preventing the regulator and the reverser from simultaneous operation. The objections sought to be obviated by the devices of the patent were well

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understood. The two types of motor in use supplied the means of obviating them in different ways, and placed them within the control of the motorman. In one type the operation of both the regulator and reverser was controlled by a single handle or lever, movable each way from a central position, and at such central position automatically reversing the motor. The prior patents, to Weston of 1882, to Seamens of 1885, and to Weis, supply examples of this type. As shown in the Weis patent, the operations of the single lever were qualified by means of blocks and springs, so that, at the time of making the reversal, resistance was interposed in the circuit until the reversal was completed, and then removed sufficiently to supply a suitable current strength to the motor. The blocks and springs controlled the contact of the resistance devices with the commutator, and were in a sense locking devices, being so arranged that, when the one set of brushes were brought into contact with the commutator, the other set were held in an off position. Thus, the reverser could not be operated until the regulator had shut off the current, and the regulator could not turn on the current until the reverser was in a receptive condition. In the other type of motors the regulator and reverser were operated by separate levers or handles, so that they could be manipulated only by a distinct operation. The prior patents, to Edison of 1883, to Sprague of 1885, and to Julien of 1888, supply examples of this type. In each of the two types it was, however, possible for the motorman to manipulate the apparatus improperly through carelessness,—in the first by performing the two operations of the single lever in too rapid sequence, and in the second by manipulating the handles of the separate levers at the same time. What the patentee did, consequently, was to introduce into motors of the second type a novel means of preventing the motorman from operating simultaneously, or substantially so, the separate regulator and reverser levers. He took the regulators and reversers as he found them in the prior art, and made no changes in their structural parts affecting their mode of operation in controlling the current, but superadded to them the devices for locking them into fixed relations with one another. What he did is described by the complainant's expert as follows:

"Knight does not pretend to have originated the idea of reversing the motor only at the time when the regulator is in its off position, or of regulating the motor only when the reverser is properly set; nor does he pretend to have originated the idea of locking the two devices together, so that a single handle can operate them only in a definite sequence. Those ideas were old, and Knight himself had used them both. What Knight did invent was the lock set and controlled by one device to lock the other."

The practical value of Knight's improvement may be conceded, but whether the two-handled controller with his interlocking devices is, on the whole, more efficient or less objectionable in practical operation on electric railways than the one-handled controller previously in use, is a question which is open to debate. Using the controller with the single lever, the motorman can reverse more quickly, and it would seem that, although in the two-handled controller the locking device prevents him from reversing too quickly, it likewise prevents

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him from reversing as quickly as is sometimes necessary. It appears that the specific locking device of the patent has never been employed, but that the two-handled controllers with devices embodying the interlocking principle have been and are extensively used.

It is insisted for the appellant that the improvements made by Knight did not involve patentable novelty; that the locking device shown in the patent is an inoperative one; and that the motors of the defendant are not an infringement of the claims of the patent. The question of infringement was regarded by the court below as the most serious one in the case.

The patent is in no sense a pioneer patent. The invention added a new feature to those pre-existing motors in which the regulator and reverser were operated by different handles. The locking device was undoubtedly an improvement in that type of motors; but it was not an invention of such novelty and importance in motor apparatus as to make a distinct step in the progress of the art as distinguished from a mere improvement or perfection of what had gone before. It did not involve any problem peculiar to electrical mechanism. It involved merely the mechanical connection of two levers, each actuating the well-known current regulating devices taken from the prior art, without modifications, and which were to be fastened together so that neither would move except when the other was at a predetermined position. To co-ordinate the two levers in such a manner as thus to restrict the movement of either was old in lever mechanism, and it had been done by interlocking devices of various kinds. This is sufficiently shown by the evidence in the record of the prior art in the interlocking of levers for controlling railway switches and signals. The United States patent of 1875, granted to Smith, Toucey, and Buchanan, describes a combination of switch and signal levers, locking bars, and shafts carrying collars and stops, so constructed and arranged that the switch lever cannot be moved until the signal lever has first been moved, and the switch lever cannot be moved without locking the signal lever. The United States patent of 1876, granted to Finch and Moore, describes a combination of two levers with interlocking devices so arranged that one cannot be moved until the other is in the off position, and the movement of either serves to lock its companion, the interlocking devices consisting of slide bars, bolts, and slots. The United States patent granted to Cummings January 2, 1883, describes devices "whereby the switch lever and signal lever shall be interlocked, so that the switch lever cannot be operated to shift the switch until the signal has first been set to indicate danger, and, so long as either of the levers is unlocked and ready to be operated, the other lever is locked and secured in its position by the operation of the one which is unlocked or moving." The interlocking devices consist of a guide plate, and an oscillating, slotted, and recessed locking plate provided with slots through which the respective levers pass. In all these instances shown in the prior art, the levers, like those of the patent in suit, are two parallel shafts provided with handles and mounted side by side in a common frame, are manually operated, and are capable, except for the locking apparatus, of being simultaneously manipulated by the operator.

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In view of the limitations imposed upon the claims by the prior state of the art, they ought not to receive a construction which will enable them to cover a combination in which the several devices are not substantially those described in the patent. It will not do to say that, because the patentee was the first to introduce locking devices into a motor in which the regulator and reverser were operated by different levers, he is entitled to a monopoly of all locking devices in such a motor that will co-ordinate the movements of the two levers so that neither will move except when the other is at a predetermined position. Precisely that function had been previously performed by the locking devices used to co-ordinate levers, and, if the patentee had done no more than to introduce them into the levers of a motor, he would merely have made a change of location. He is entitled to the merit of being the first to conceive of the utility of interlocking the two levers of a motor controller of the type in which separate levers are employed, but his right to a patent must rest on the novelty of the means he has contrived to carry his idea into practical application. Aron v. Railroad Co., 132 U. S. 84, 10 Sup. Ct. 24, 33 L. Ed. 272. The patent cannot be broader than the real invention, and that is measured by the novelty of the particular contrivances which constitute the locking mechanism.

The first four claims of the patent are each framed to cover in the broadest terms the combination of any locking device with the other parts of a two-lever controlling apparatus which will effect the function or result recited in the particular claim. It is insisted for the complainant that they are infringed by any motor controller apparatus in which there is intervening mechanism between the reversing and the regulating levers which is operated by either lever to lock the other. The fifth claim is appropriately framed to secure to the patentee his real invention, and covers the locking devices described in the specification, including, of course, those which are substantially the same things.

We are of the opinion that the broad claims of the patent are not warranted by the scope of the real invention of Knight. As it is not asserted by the complainant that infringement of the fifth claim has been established, it is unnecessary to advert to the differences between the devices employed by the defendant and the patented devices. We conclude that the first four claims of the patent are invalid, and, in the absence of any proof of infringement by the defendant of the fifth claim, that the court below should have dismissed the complainant's bill, with costs.

The decree is accordingly reversed, with costs to the appellant, and with instructions to the court below to decree conformably with this opinion.

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(107 Fed. 716.)

CONSOLIDATED STORE-SERVICE CO. v. SIEGEL-COOPER CO. et al.

(Circuit Court of Appeals, Second Circuit. April 3, 1901.)

No. 110.

1. PATENTS—INVENTION.

The Osgood patent, No. 357,851, for an improvement in a cash-car apparatus,—the device described consisting of a car rigidly suspended by two wheel hangers from a horizontal wire, along which it is moved by a push of the hand,—discloses a patentable invention, which was not anticipated, and is valid.

2. SAME—INFRINGEMENT.

Claim No. 1 of the Osgood patent, No. 357,851, must be limited to an apparatus in which gravity does not suffice to start and carry the car to its destination, in order to save the claim from invalidity, in view of the prior art, and also because the specification states, "it is manifest that the wire must be practically horizontal," and a two-wheeled carrier is also an indispensable constituent of the claim, so that it is not infringed by a carrier having a single wheel, nor by a device in which the wire track is inclined so that the car runs thereon by gravity.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Frederick P. Fish, for appellant.

Albert H. Walker, for appellees.

Before WALLACE and LACOMBE, Circuit Judges.

WALLACE, Circuit Judge. The appellant has waived the assignments of error, except those which challenge the decision of the court below in respect to claim 1 of letters patent No. 357,851. The court below decided that claim to be valid, but that it was not infringed by the defendants. 103 Fed. 489. The appellees insist that the decree dismissing the bill should be affirmed because of the invalidity of that claim, for want of patentable novelty, as well as upon the ground upon which the decree was placed by the court below.

The patent (granted to Edward P. Osgood February 15, 1887) is for "store-service apparatus," and describes an invention for "an improved cash-car apparatus or system for salesrooms and the like." Claim 1 is as follows:

"(1) In a cash-car apparatus, a wire stretched horizontally between fixed supports at each end and in the described relation to the cashier's desk, in combination with a freely-moving car held below the wire on wheel hangers, to which it is rigidly connected, the wheels thereof being fitted to run one behind the other on the wire, whereby the car is held rigidly against oscillation longitudinally of the way, the whole moving structure being thus adapted to be impelled as a solid body from one end of the way to the other in either direction by the momentum imparted by a single impulse or push, substantially as described."

For the purpose of ascertaining the scope of the patent, only those of the prior patents which most nearly anticipate the claim need be adverted to. Considered generally, the patent is one for a system or apparatus having a horizontal taut wire without intermediate standards or supports, and without devices for imparting

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initial impetus to the car; the car being secured against longitudinal oscillation by a rigid connection through hangers to two wheels running one behind the other on the wire, and being started upon its errand to and fro by a single push of the hand. The patent to Brown, No. 165,473, shows an apparatus containing all the parts of the claim in controversy, except as regards a difference of form and proportion in the carrier, viz. the wire horizontally stretched between fixed supports at each end, the freely-moving car held below the wire on wheel hangers to which it is rigidly connected; the wheels fitted to run one behind the other on the wire, and to hold the car rigidly against longitudinal oscillation. But the carrier of that patent is designed to be propelled by cords passing over pulleys and connected with the carrier at top and bottom to steady its movements, and the omission of these parts in the apparatus of the patent in suit introduces a different mode of operation, and suffices to constitute patentable novelty. The patent to White, No. 221,448, shows an apparatus in which the impetus of the carrier is started by a push of the hand. It consists of two tracks, one inclined from the cashier's office and the other towards it, so that the car will descend by force of gravity and travel automatically from one end to the other. When it reaches either end it is removed to the other track, where it returns to its starting place by gravity. The track consists of thin bars or rails of metal in short sections. They are supported by standards at the ends and intermediate depending rods. The carrier hangers and wheels, except as to matters of form and proportion, are those of the patent in suit. In the apparatus of the patent in suit the taut wire may be regarded as essentially the same thing as the thin metal rail of Hayden, but one of the tracks and the intermediate supports of the tracks are dispensed with. What Osgood did was to modify the apparatus of Brown by dispensing with the devices for giving initial impetus to the carrier and assisting in its propulsion. He did not do this by substituting the inclined track of White. If he had merely made such a substitution, it would not have introduced invention, because, being informed by the White patent of the adaptability of the gravity system to do the work of the starting and propelling devices in the Brown apparatus, it would have been an obvious thing to utilize the inclined track and dispense with these devices. Besides this substitution, he made mechanical improvements in other matters of form and detail. He was the first to apply practically the thought that a carrier like those of Brown or White could be propelled satisfactorily to its destination upon a taut horizontal wire, without starting devices, and without the assistance of gravity, and by embodying his conception in the organization which he devised he was enabled to dispense with the unnecessary but more or less expensive adjuncts such as Brown and White had employed.

While recognizing the meritorious character of his improvements, it is very difficult to locate the boundaries of his invention. The length of the wire and the size or weight of the carrier employed enter largely into the value and the patentable novelty of his im-

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provements. His apparatus would be of very limited utility if a heavy carrier were used. The use of a short wire for the track of the carrier would not involve invention, because every man of common sense would recognize its adaptability for conveying for a short distance a carrier started by a push of the hand. Still his apparatus is adapted to the purposes disclosed in the specification,—to be used commercially in store service; and it is not denuded of its novelty because, if it were so constructed that it would not be adaptable to such a purpose, it would not disclose any invention. We place no emphasis upon the consideration that the patented invention does not require two tracks. A double track is as desirable in his system as it is in all store-service systems, so that a car going in one direction will not encounter one coming from another direction; and the complainant's expert states that the double track is always present when the system is used commercially.

Agreeing with the conclusions of the court below upon the question of patentable novelty, we are of opinion that the claim in controversy must be limited to apparatus in which gravity does not suffice to start and carry the car to its destination. Not only is this construction necessary to save the claim from invalidity, in view of the prior art, but the specification states, "It is manifest that the wire must be practically horizontal," and the claim makes a "horizontal wire" a constituent. Concededly, a two-wheeled carrier is also an indispensable constituent of the claim.

That part of the defendants' system on which two-wheeled carriers are used has wire ways varying from about 10 feet to about 40 feet in length, and each of them runs on a down grade varying from 1 foot in 10 to 1 foot in 22. Obviously, these are not practically horizontal, and consequently the claim is not infringed.

The decree of the court below is affirmed, with costs.

(107 Fed. 719.)

REED MFG. CO. v. SMITH & WINCHESTER CO. et al.

(Circuit Court of Appeals, Second Circuit. April 3, 1901.)

No. 114.

PATENTS—INFRINGEMENT—INJUNCTION.

In a suit for the infringement of letters patent No. 608,720, for a collar turning and ironing machine, granted August 9, 1898, to William C. Shaw, where it appears that the patent is a recent one, and there is no such proof of long-continued acquiescence by the public as would raise a prima facie case in the patentee's favor, and there is a substantial question as to infringement, which can be settled only on construction of the patent requiring a presentation of the state of the art and a history of the invention, a preliminary injunction should not be granted without proof of a prior adjudication; and the fact that in interference proceedings in the patent office eight different applicants were involved, of whom only the patentee and one other took testimony settling the question of priority between the patentee and that other, is not such an adjudication as the practice calls for.

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Appeal from the Circuit Court of the United States for the District of Connecticut.

This cause comes here upon appeal from an order of the circuit court, district of Connecticut, granting an injunction pendente lite in a suit for infringement of a patent. 103 Fed. 796.

Willard Eddy, for appellants.

Hugh C. Lord, for appellee.

Before LACOMBE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The suit is upon letters patent No. 608,720, dated August 9, 1898, to William C. Shaw for a collar turning and ironing machine. As stated in the specification, it embodies "mechanism for turning the rolls of turn-down collars, and for turning the tips and finishing the edge of stand-up collars; and it consists, substantially, of a vertical semicircular plate, over which the collars are turned, and grooved sadirons, adapted to move in the arcs of circles over said semicircular plate, for ironing the turns of the collars thereon. Heating devices are also provided upon which the sadirons rest when not in use." The claim sued on is:

"(1) In a collar turning and ironing machine, the combination of a curved flange-shaped former, over which the collar is folded and curved into proper shape for wear, a grooved iron arranged opposite the former, and means for moving the grooved iron into engagement with the former, and for moving one of said parts upon the other, substantially as set forth."

The alleged infringing machine is made under patent No. 627,889, granted June 27, 1899, to defendant Asher. The patent sued upon is a very recent one, and there is no such proof of long-continued acquiescence by the public as would raise a prima facie case in the patentee's favor. Under such circumstances, it is the practice in this circuit to refuse preliminary injunction when there has been no adjudication sustaining the patent, if there appears to be any fair question as to invention, anticipation, construction, or infringement. Dickerson v. Machine Co. (C. C.) 35 Fed. 143.

It will be noted that the claim sued on may be interpreted as containing either three or four elements. Complainant contends that it covers (1) "a curved covered flange-shaped former"; (2) "a grooved iron arranged opposite the former"; (3) means for moving the grooved iron into engagement with the former; (4) means for moving one of said parts upon the other. Defendant contends that it covers (1) and (2) as above; (3) means for moving the grooved iron into engagement with the former, and for moving one of said parts upon the other. In the machine shown in the patent there are two pivoted arms, having operating handles. By manipulation of these arms and handles the sadirons are brought from the shelf on which they have been heated, and placed in engagement with the former, and by further manipulation of said arms and handles the sadirons are moved upon the former. In defendant's machine there is mechanism by which the sadiron is brought into engagement with the former, but when that has been done the operator ceases to operate such mechanism, and with his hands moves the former back and forth under the sadiron.

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It is quite manifest that there is presented a substantial question as to infringement, which can be settled only upon construction of the patent, and that requires a presentation of the state of the art and a history of the invention in the patent office. The case would seem to be one in which preliminary injunction should not be granted without proof of prior adjudication. Complainant relies upon a decision of the patent office in an interference proceeding, in which eight different applicants were involved, of whom only Shaw and Asher took testimony. That decision, however, only settled the question of priority as between Shaw and Asher, and is not such an adjudication as the practice calls for, where there is substantial question as to construction and infringement. Dickerson v. Machine Co., supra; Ironclad Mfg. Co. v. Jacob J. Vollrath Mfg. Co. (C. C.) 52 Fed. 143; Rogers Typographic Co. v. Mergenthaler Linotype Co. (C. C.) 58 Fed. 693.

The order appealed from is reversed, with costs of this appeal.

(107 Fed. 727.)

THE ST. HUBERT.

(Circuit Court of Appeals, Third Circuit. March 6, 1901.)

No. 20.

1. SHIPPING—DAMAGE TO CARGO—CONDITION OF BILL OF LADING REQUIRING NOTICE OF CLAIM.

   A provision of a bill of lading that "the shipowner is not to be liable * * * for any claim, notice of which is not given before the removal of the goods," imposes a reasonable and valid condition precedent to the right to maintain a suit for damage to the goods in shipment, either against the shipowner personally or in rem; and a failure to comply with such condition is not excused by the fact that the ship had knowledge of the damage, the purpose of the requirement being to advise the owners that they are charged with liability therefor.

2. SAME—CONSTRUCTION AND VALIDITY.

   A provision of a bill of lading that the shipowner is not to be liable for any claim, "notice of which is not given before the removal of the goods," properly construed, does not require such notice to be given before the goods are taken from the ship, but before their removal from the dock where they are deposited by the ship, and where, after they are released from the ship's tackle, they may be inspected and examined, both by the consignees and the officers of the ship. So construed, such provision is reasonable and valid.

3. SAME—TRANSSHIPMENT BY THROUGH CARRIER—LIABILITY OF SECOND CARRIER.

   The general course of business in forwarding when the ship of the signer of a through bill of lading does not go all the way to the port of ultimate destination, of which fact the shipper has knowledge, or is given notice by the through bill of lading, and the manifest necessity of transshipment by the through undertaker under such contract as it can reasonably make, justifies the presumption of its authority to make such contract, and to bind the shipper thereby, although the terms of the new contract may not be in all respects the same as its own; but, in any event, the undertaking and liability of the second carrier are measured by its own contract, provided its terms are reasonable, and not in contravention of the maritime law.

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Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

Francis S. Laws, for appellant.
G. Whitefield Betts, Jr., for appellee.

Before DALLAS and GRAY, Circuit Judges, and BRADFORD, District Judge.

GRAY, Circuit Judge. This is an appeal by libelant from a final decree in admiralty of the district court for the Eastern district of Pennsylvania, entered June 15, 1900, dismissing the libel, with costs. 102 Fed. 362. The libel was in rem, and was filed to recover the sum of $2,157.38, as alleged damages to 65 bales of goatskins, shipped at London, England, on or about September 10, 1897, and delivered at Philadelphia on or about October 8, 1897, by the steamship St. Hubert. These skins were originally shipped at Calcutta, and transshipped on the steamship St. Hubert, at London, for Philadelphia. It is alleged in the libel that the goatskins were insured by the libelant, and that they paid the consignees and owners the said sum of $2,157.38 as the amount of damage thereto, and for which they were liable as underwriters. It therefore brings its suit, claiming that the damage was caused by water, while the skins were being carried from London to Philadelphia, and was due to want of proper care of the skins, unseaworthiness of the said St. Hubert at the time of the shipment, lack of proper stowage and dunnage, and negligence and mismanagement of the vessel by master and crew. In July, 1897, Stanley & Co., of Calcutta, acting as agents for Cooper, Smith & Co., of Philadelphia, shipped to them 65 bales of goatskins, on board the steamships Palawan and City of Sparta; 40 bales going by the Palawan and 25 by the Sparta. The Palawan was a vessel of the Peninsular & Oriental Steam Navigation Company, and the Sparta was a vessel of the so-called "City Line"; neither of said ships carrying goods further than the port of London. The skins were shipped upon through bills of lading, by which the owners of the lines respectively contracted for their carriage and delivery "upon order * * * at the port of Philadelphia." At London the goods were transshipped by the agents of the two lines owning severally the Palawan and the Sparta on board the steamship St. Hubert, to be transported by it across the Atlantic to Philadelphia. For this transshipment from the original carriers to the steamship St. Hubert, bills of lading were given by the St. Hubert to the representatives of the original carriers. The bills of lading given by the owners of the Palawan and Sparta were through bills of lading from Calcutta to Philadelphia; that of the Palawan stating that the skins were to be carried via London, with a stipulation that "the company are to be at liberty to carry the said goods to the port of their destination by the above or other steamer or steamers, ship or ships, either belonging to the company or to other persons." The bill of lading for the skins shipped by the Sparta is also a through bill of lading from Calcutta to Philadelphia, but states that the ship is bound for London via Suez Canal, and that the goods are "to be transshipped or landed at London, with liberty to

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warehouse there, and from London to be forwarded by steamer, at the risk of the shipper, but at ship's expense, and to be delivered subject to the exceptions and conditions at foot hereof." It also has a general stipulation similar to that of the Palawan,—that the "owners are to be at liberty to carry the said goods to their port of destination by the above or other steamer or steamers, ship or ships, either belonging to the owners or other persons, * * * and to transship * * * the goods, either on shore or afloat, and reship and forward the same, at owner's expense, but at merchant's risk." Upon this bill of lading of the Sparta there is also the following note: "The goods to be carried to Philadelphia, subject to the terms and conditions of local bills of lading issued by the agents of such steamer or steamers." The bills of lading issued by the St. Hubert to the owners or agents of the owners of the Palawan and Sparta, the original carriers, were on the usual printed forms of an ocean bill of lading from London to Philadelphia, receipting for the goods as from the original carriers, and contracting to carry them as stated, "to be delivered against production of through bill of lading, properly indorsed, issued for these goods, per Palawan (or Sparta, as the case may be), or to his or their assigns." These bills of lading also contain the usual stipulations and exceptions in favor of the ship and its owners, and, among others, the following: "The shipowner is not liable for any damage to any goods which is capable of being covered by insurance, nor for any claim, notice of which is not given before the removal of the goods." This transshipment of the skins in question at London from the ships Palawan and Sparta to the steamship St. Hubert, and the issuance by the owners of the St. Hubert of the said ocean bill of lading to the owners or agents of the other steamers, was in September, 1897. In due course thereafter the St. Hubert sailed, reaching Philadelphia about October 8th. Upon the arrival of the steamship at the dock in Philadelphia, the consignees, who were disclosed by the indorsement on the through bill of lading, according to which the St. Hubert had contracted by her bill of lading to deliver the goods, were duly notified, and the goods, two days thereafter, were landed by the steamship upon a covered dock. The consignees, upon the reception of the notice, handed the dock order to their broker, who proceeded to the dock, and examined the skins then landed thereon. They were reported by him to be wet, and, in consequence thereof, damaged, and the consignees reported that fact to the insurance company, the libelant and appellant herein. The skins were taken from the wharf to the storehouse of the broker, and by arrangement between the libelant insurance company and the consignees and owners the skins were sold, and the difference in import value and the proceeds of sale was paid to the owners by the libelant. As subrogated to the rights of the consignees, the libelant brought this action against the ship in the court below, alleging damage to have been occasioned as heretofore stated. The answer of the claimant, as owner of the St. Hubert, denies the charges of negligence in the libel, sets up as defenses a number of exceptions in the local or ocean bills of lading issued by the St. Hubert, including the defense that no notice of claim was given by the libelant or its assured, in accordance with the terms

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of the provision in that behalf contained in said bills of lading. This provision was, as heretofore quoted, in form a stipulation that the shipowner is not liable for "any claim, notice of which is not given before the removal of the goods."

In the view taken by the court below, as also by this court, the controversy over this stipulation, its proper construction, and its applicability to the case in hand, is determinative of the rights of the parties in this suit. No question was made by the libelant as to the fact that no notice of a claim for damages was given, either by the consignees or the libelant, to the ship, or the master thereof, or to any one representing it or the claimant. It was contended, however, that knowledge of the damp condition of the skins when landed upon the wharf, and before they were removed therefrom, was brought home to the master and ship's agents by reason of the following facts: First, that the draymen who took the skins from the wharf to the storehouse of the consignees' broker, on his receipt for the same, noted that four of the bales were wet; second, that, owing to the fact that one of the water-tight compartments in the hold of the ship had been flooded to extinguish a fire during the voyage, a general average bond was demanded from the consignees by the general average adjusters on the supposition that the goods had been damaged by the water in or from said compartment, and were subject to general average, and to them was made the usual general average claim. This supposition was afterwards found incorrect, and the claim was not allowed. It is obvious, however, if the stipulation for notice here in question was binding upon the consignees and libelant, as a condition of a contract of affreightment on the St. Hubert, that no compliance with such condition can be inferred from either of the circumstances above alluded to. The notice stipulated for was one of claim against the ship or owner, not of the fact of damage, more or less, for which the owners and their representatives might well be justified in believing no claim would be made. There is no evidence that the adjusters represented the ship in any way, or had any authority to receive claims, and it is perfectly clear that no claim for damages was ever presented to them. Their office was an entirely different one, as has been explained. Stipulations for such "notices of claim" have frequently been considered by the courts, and their reasonableness asserted. The ship or its owner desires to know, not merely whether there is damage, for which no demand may ever be made, but whether there is any claim for damages made by the consignee, so that the necessary investigation can be made to ascertain the facts while they are fresh. The very dispute in this case—as to the cause of damage—shows the reasonableness of some stipulation of this kind. Angel v. Steamship Co. (D. C.) 55 Fed. 1005; Moore v. Harris, 1 App. Cas. 318.

In the present case the owners of the goods and their broker testified that they examined and opened the bales of skins on the wharf, and found them wet; but no claim was made, either by the owners or the libelant, to the ship, or to any one representing it, for several months thereafter. A member of the firm of Cooper, Smith & Co., owners of the goods, who examined the skins upon the dock, and afterwards in the broker's store, admitted that he never made any claim

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on the steamship or her agents, and said that he never thought he had any claim on them; that he had a claim on the insurance company, and looked to it. The record undoubtedly discloses the fact, and it must be taken, as found by the court below, that no notice was given to the ship, its owners or agents, that a claim for damages would be made against it or them, until some months had elapsed after the removal of the goods.

It is further contended by the libelant that the stipulation as to notice contained in the St. Hubert's bill of lading is not a defense to an action in rem, because the provision was only for the protection of the shipowners, and did not apply to the ship. We do not think there is either reason or authority for so narrow and harsh a construction of this stipulation as to notice. There may be cases in which it is necessary to discriminate between the liability of the shipowner and that of the ship, but this is not one of them. It is an exemption stipulated for in the bill of lading of the ship for injury to goods done on the ship, notice of claim for which is required to be given before removal from the custody of the ship. The shipowner can hardly be said to have secured himself against liability for want of notice of claim, if such exemption is not available when his property is seized and subjected to payment of that very liability. As said by Judge McPherson in the case of The Westminster (D. C.) 102 Fed. 368, where a similar clause was under consideration:

"This, I think, cannot properly be construed so as to exempt the shipowner if he should be sued personally in a formal proceeding that may end in seizing his property by one kind of writ, and to deny him exemption if he should be sued in another form of proceeding that seizes his property in the beginning by a different kind of writ. * * * Ultimately his property is to be reached in order to satisfy the libelant's claim; and, if he is 'liable' when his property is exposed to the danger of a final writ of execution in a personal action, I can see no ground for holding that he is any the less liable when his property is seized in limine by a proceeding in rem. It is familiar law that exemptions are to be strictly construed against the carrier, but even in an exemption a strained construction should not prevail over the plain meaning of words."

We do not think anything can be added to the statement above made of what we think to be the law. The case of The Queen of the Pacific (D. C.) 61 Fed. 213, cited by the libelant, is not, in our opinion, when considered with reference to the peculiar facts of the case, in conflict with what is here held; but, even if it should be considered as authorizing a different construction of the clause in question, we must respectfully dissent therefrom.

This brings us to the underlying question, raised by the assignments of error, in this case, and decided by the court below in favor of the respondent,—whether the claimant's local bills of lading are the evidence of the contract for the carriage of the skins by the St. Hubert, and, as such, binding upon the parties to this suit as to the entire shipment. If they are not, the stipulation as to notice, which we have just been considering, would have no relevancy in the present case. Some objection has been made to the sufficiency of the proof of these local bills of lading. It is only necessary to say as to this that, in view of what the record discloses, and what was said by counsel on both sides at the argument before us, we must hold that these local

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bills of lading of the St. Hubert are properly before the court. If they are the evidence of the contract pursuant to which these skins were carried by the St. Hubert from London to Philadelphia, then the consignees and libelant are bound by the stipulation as to notice referred to. Though the goods were shipped at Calcutta, by agents acting for Cooper, Smith & Co., of Philadelphia, who were the owners of the goods, and by through bills of lading to Philadelphia, it must be taken as understood by the parties that the owners of the lines issuing said through bills contemplated a transshipment at London to some steamer or steamers other than their own, by which the carriage of these skins to Philadelphia was to be completed. Express evidence also is not wanting that the owners and shippers of the skins and the libelant were informed and knew that the goods were transshipped at London to the St. Hubert, and were being carried by her from that port to Philadelphia. The orders to the libelant for insurance made by the owners call for insurance on goatskins "per steamer City of Sparta (and steamer Palawan) from Calcutta to Philadelphia; transshipment via London and S/S St. Hubert, for account of whom it may concern," etc. From this testimony, the effect of which is not controverted, it would seem clear that the transshipment at London was ratified or acquiesced in by the owners as a transaction authorized by their contract with the original carriers. Undoubtedly, the contract of Cooper, Smith & Co. was with these original carriers, and they (the carriers) were responsible to the consignees for the entire service contracted for, and the delivery of the goods in Philadelphia. In performing that service, however, it was necessary, and, as we have said, so understood by the parties to the contract, that a new and independent carrier from London to Philadelphia would have to be employed by the original carriers. The contract with such new carrier was a bilateral one, to which Cooper, Smith & Co. were not parties, though interested as consignees, to whom delivery was owing by the new carrier under the terms of its independent contract with the old carriers. Such new carrier was not in any way bound by the terms or stipulations of the through bills of lading, unless as they were expressly adopted by it as applicable to the particular service in which it was engaging. The new carrier receipted for the goods from the old, and delivered to them its bills of lading, which were the measure of its responsibility, and the terms of which were binding upon it, as an obligation of its own contract freely entered into. There is in these bills of lading a single reference to the through bills of lading issued by the owners of the Palawan and Sparta, in Calcutta, and that is the convenient and usual one in cases of transshipment that the delivery of the goods is to be made to the party or parties who appear to be consignees of the through bills of lading, properly indorsed. But this is an express term and stipulation of the particular bills of lading issued by the new carrier. The terms upon which the service was to be performed depended upon the consent of the new carrier as embodied in the agreement of its bills of lading. It assumed no duty or obligation towards the consignees, other than as stated and limited therein. The original carriers were obliged to make the best bargain they could for the continuance of the carriage service they

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had undertaken for the owners and consignees. If circumstances had been such as that, for instance, no vessel could have been engaged to carry the goods from London to Philadelphia for a freight rate that would not exceed the whole freight as stipulated for in the original contract upon the three bills of lading, it would have been the loss of such original carriers, and not of the consignees. In other words, the goods were carried from London to Philadelphia under and pursuant to a special and independent contract between the original carriers and the owners of the St. Hubert. By that contract a certain stipulation for the protection of the new carrier was made, which is not in itself unreasonable. Like the contract itself, this stipulation may be considered within the general powers conferred upon the original carriers by the shippers and owners, even without the express evidence alluded to of knowledge of and acquiescence in the transshipment to the St. Hubert. The general course of business in forwarding when the ship of the signer of the through bill of lading does not go all the way to the port of ultimate destination, and of which fact the through bill of lading gives notice, and the manifest necessity of the case that the through undertaker should transship under such contract as he can reasonably make, justifies the presumption of the requisite authority, in the absence of any notice of want thereof brought to the knowledge of the new carrier.

Another view of the situation of the parties from its legal standpoint is that one who contracts, on a through bill of lading, to carry goods from one port to another, is responsible to the owner or consignee for the entire service between the two ports, whether in his own ships or in those procured by him to enable or assist him to perform his contract. Such assistance from other and independent carriers may be necessary to the fulfillment of his undertaking under his through bill of lading. It is not required that he, or the independent auxiliary carrier, should invoke the authority of agency, express or implied, from the shipper or owners, to sanction such procurement; as it can be referred to the free choice of means open to the signers of the through bill of lading, with which the shipper or consignee has no right to interfere. The latter may hold the through carrier to a strict fulfillment of his contract with them, but neither of them is on that account a party to such auxiliary contracts. In the exercise of this freedom of contract the engagement between the original and new carrier is, of course, subject to those duties and requirements which are imposed and exacted by the maritime law, but in all other respects the independent contract of the two carriers must be taken to govern the transportation service thereby undertaken. Its reasonable conditions and exemptions are as much a part thereof, and are as binding, as the main stipulation of carriage and affreightment. If the terms are more favorable to such new carrier than those contained in the through bill of lading, the owner, if he suffer thereby, must look for redress under that original contract. In the language of the court below:

"To say that the first bill of lading binds the second carrier is to require him to submit to a contract concerning which he was not consulted, and to which he did not agree."

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What we have said applies to the whole shipment from both the Sparta and the Palawan on the St. Hubert; but the note on the margin of the through bill of lading of the Sparta, above recited, would seem to remove all ground for controversy as to the 25 bales of skins received from that ship. We are of opinion, therefore, that the stipulation as to notice contained in the St. Hubert's bill of lading was, if reasonable in its character, binding upon the consignees and the libelant, which was subrogated to their rights. The liability of the last carrier to the owners of the goods it had undertaken to carry, whether that liability rested on contract or in tort, must be taken to be limited by the express stipulation contained in its individual contract of service. The learned judge of the court below has found that the requirement of notice before removal of the goods would be unreasonable in so far as it was construed to mean before removal of goods from the ship, but that, in as much as notice of claim was required by the contract under which the goods were carried, a notice within a reasonable time after the removal of the goods from the ship or their delivery to the consignee should still be exacted. Undoubtedly, notice of claim of damage, without regard to the precise time when made, is of the essence of the stipulation, and, if it divisible from the stipulation that it should be made before removal from the ship, if that be the true construction thereof, and as in fact no notice of such claim was given until between three and four months after the delivery of the goods, and after three or more intervening voyages of the ship had been made, the court was right in deciding that such a notice was not within the reasonable time that the law would require. We do not think, however, that such a construction of the stipulation in question is demanded by the language in which it is expressed. The words are that the shipowner is not liable for any claim, "notice of which is not given before the removal of the goods." The "removal of the goods" here mentioned does not, we think, necessarily mean, or, under a reasonable construction of the clause, properly mean, the removal from the ship, but removal from the place of deposit of the goods upon the dock or wharf when freed from the ship's tackle. Removal thence would be removal out of the view of, and possibility of inspection by, the officers of the ship, and might reasonably qualify the ship's liability, if so stipulated; whereas to require notice before removal from the ship itself would be to impose upon the consignee a condition almost, if not quite, impossible of performance. Where two constructions of a contract are equally consonant with its language, the one reasonable and the other unreasonable, the law will adopt that construction which is reasonable and works no injustice to either party.

The expression of these views renders unnecessary the consideration by this court of the questions of fact raised by the libelant as to whether the skins were wet or not, and, if wet, whether they became so by natural process of sweating, or by some want or unseaworthiness in the vessel, or negligence of those in charge of her; and it only remains to say that the decree of the court below is affirmed.

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(107 Fed. 734.)

FORREST v. VANDERBILT.

(Circuit Court of Appeals, Third Circuit. March 11, 1901.)

No. 18.

1. SHIPPING—SALE OF YACHT—APPURTENANCES—LAUNCH TENDER.
A naptha launch used by the owner as a tender, in connection with a 30-foot yacht owned by him, but which could not be carried on the yacht, did not accompany it on its trips, and was not a part of the usual equipment of such yachts, did not by such use, merely as a matter of convenience, become an appurtenance of the yacht, which passed by a sale of the latter.

2. AGENCY—SCOPE OF AGENT'S AUTHORITY—UNAUTHORIZED SALE OF VESSEL.
Agents who are authorized by the owner to sell a yacht are not thereby given any authority, either actual or apparent, to sell a naptha launch, sometimes used as a tender to the yacht, but which was not legally an appurtenance thereto, but a separate vessel, and, in the absence of actual authority, they cannot bind the owner by a sale of the launch.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

Robert D. Coxe, for appellant.
J. Rodman Paul, for appellee.

Before DALLAS and GRAY, Circuit Judges, and BRADFORD, District Judge.

BRADFORD, District Judge. This is an appeal from a decree in a cause of possession, civil and maritime. William K. Vanderbilt, Jr., the appellee, filed his libel to recover a certain naptha launch alleged then to be in the possession of Robert L. Forrest and J. G. Neafie-Whitaker. Forrest alone made claim to the launch and answer to the libel. The case was heard on exceptions to the answer. The exceptions were sustained, and the court below decreed that possession of the launch should forthwith be delivered to the libelant by Forrest. The averments of the libel material to the inquiry before us are as follows:

"First. That the libellant is the true and lawful owner of the said naptha launch. * * *

Second. That possession of the said naptha launch is now and has been since on or about the first day of May last past wrongfully withheld from the libellant by the said Robert L. Forrest on an alleged ground of title to the possession of said naptha launch.

Third. That the said claim of title to the possession of the said naptha launch is entirely invalid and insufficient, the same being dependent upon and referred to an alleged sale by the said libellant to the said Robert L. Forrest of the said naptha launch, whereas in fact there was no sale either in law or in fact of the said naptha launch to the said Robert L. Forrest as is hereinafter set forth.

Fourth. That on or about the 28th day of March, 1900, the libellant, through his agents, Gardiner & Cox, sold to the said Robert L. Forrest the yacht 'Carmita,' then being at Newport, Rhode Island, in the custody of the Newport Ship Yard, for the sum of four thousand dollars ($4,000), subject to her being sound and in good condition. * * * The said naptha launch * * * in no way belonged to, was appurtenant to, nor was a tender to the yacht 'Carmita,' but on the contrary the said naptha launch was far too large to be

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used with and hoisted aboard the yacht 'Carmita,' and no arrangements were or could be provided upon said yacht for the hoisting aboard of the said naptha launch.

Fifth. That the said libellant had authorized and instructed the said agents Gardiner & Cox to sell the said yacht 'Carmita' but had in no respect authorized or instructed them to sell the naptha launch, and they had in fact no authority whatsoever from the libellant to sell said launch, nor was any mention made of said launch in the contract of sale whereby the said Robert L. Forrest purchased the yacht 'Carmita' from libellant through his said agents. The said contract of sale is contained in two letters marked 'A' and 'B,' true copies of which are appended hereto and asked to be taken as a part hereof.

Sixth. That on or about the seventh day of April, 1900, the said Robert L. Forrest having inspected the yacht 'Carmita,' and having found her sound and in good condition, paid to the said Gardiner & Cox as agents for said libellant the purchase price thereof, being four thousand dollars ($4,000), and himself dictated the receipt for said purchase price, a true copy of which is hereto appended marked 'C,' and asked to be taken as part hereof, wherein in enumerating the various items of the equipment of the said yacht 'Carmita,' was included the word 'launch'; and said receipt without the authority, knowledge or consent of the libellant who had authorized his said agents to sell the yacht 'Carmita' only was improvidently signed by them without noticing that the word 'launch' was contained therein, and said receipt was delivered to the said Robert L. Forrest.

Seventh. That thereupon the said Robert L. Forrest upon presentation of the said receipt at the said Newport Ship Yard received and took away not only the yacht 'Carmita' but also the said naptha launch, which was delivered to him without authority from the libellant or anyone on his behalf and against the express instructions of libellant's agents. That said Robert L. Forrest was informed by Gardiner & Cox and by the Newport Ship Yard's president and employees before taking the launch that William K. Vanderbilt, Jr., as soon as advised of the matter repudiated the sale of the launch and denied any authority on the part of Gardiner & Cox to sell same or order its delivery.

Eighth. That thereupon the libellant having discovered that said naptha launch had been delivered to the said Robert L. Forrest without the knowledge and consent of libellant, made due demand upon the said Robert L. Forrest that he deliver to him possession of the said naptha launch, which the said Robert L. Forrest has omitted and refused to do."

The two letters mentioned in paragraph 5 of the libel and the receipt mentioned in paragraph 6 thereof are as follows:

"A.

March 28, 1900.

To J. G. Neafie-Whitaker, Esq., Philadelphia—Dear Sir: We beg to advise you that Mr. W. K. Vanderbilt, Jr., has accepted your offer for your friend of $4,000 for the 'Carmita,' subject to her being sound and in good condition. We also enclose you copy of letter sent to Mr. Vanderbilt. Mr. Evans is better, etc., etc.

Gardiner & Cox.

B.

Messrs. Gardiner & Cox, 1 Broadway, New York City—Gentlemen: Through the courtesy of Mr. J. G. Neafie-Whitaker, I understand that my offer of $4,000 for 'Carmita' subject to my inspection being satisfactory, has been accepted. Owing to press of business, I will be unable to get away from here until after the middle of the coming week, when I will be in New York and go from there, with my skipper, to Newport to see the boat. I trust that we can have the transaction entirely settled without any great delay. Mr. Whitaker has kindly given me copy of your letter to Mr. Vanderbilt. I trust that you will be able to furnish a complete inventory of everything belonging to 'Carmita,' and awaiting your favor I remain,

Very truly yours,

R. L. F. Robert L. Forrest.

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C.

New York, April 7, 1900.

Received of Robert L. Forrest four thousand ($4,000) in full payment for yacht 'Carmita,' including her boats, launch-tender, spars, sails and complete interior and deck fittings to put her in full commission, said boat and appurtenances above mentioned to be delivered at once to you.

W. K. Vanderbilt, Jr.,
By Gardiner & Cox, Yacht Agents."

The averments of the answer so far as material to the decision of this appeal are as follows:

"First. This claimant and respondent denies that the libellant is the true and lawful owner of the said naptha launch. * * *

Second. This claimant denies that possession of the said naptha launch has been wrongfully withheld from the libellant by the claimant, Robert L. Forrest, since on or about the first day of May, 1900.

Third. It is true as averred in the third paragraph of the libel in this cause, that this claimant, the said Robert L. Forrest, claims title to the said naptha launch; but it is not true, as averred in the said libel, that the said Robert L. Forrest's claim of title is entirely invalid and insufficient. Nor is it true, as averred in the said libel, that there was no sale, either in law or in fact, of the said naptha launch to the said Robert L. Forrest. As is hereinafter set forth, this claimant's title to the said naptha launch is derived from an unimpeachable sale thereof by the accredited agents of the libellant and is complete.

Fourth. The averment in the fourth paragraph of the said libel as to the sale of the yacht 'Carmita' by the libellant through his agents, Gardiner & Cox, is incorrect and misleading, and is untrue so far as it fails to describe the real nature of the transaction between said agents and this claimant. The true character of the said transaction, covering a sale of the said yacht with the said naptha launch, is hereinafter fully set forth. * * * It is true that the said naptha launch was likewise at Newport, but this claimant denies the averment that the said naptha launch in no way belonged to, nor was appurtenant, nor was a tender to the yacht 'Carmita.' * * * In point of fact, the said yacht 'Carmita' was designed, constructed and has been used as a racing yacht, and with such object in view, when in racing trim, there is no adequate provision but for one, or at the most two, light boats in compliance, merely with the requirements of the law. While it is, undoubtedly, true that a naptha launch of the size of the naptha launch libelled in this proceeding could not be hoisted on the deck of the yacht 'Carmita,' it is still the fact that it is the custom for such yacht to have such a naptha launch as a tender in its service. So that the difficulty or impossibility of hoisting the said naptha launch on board is not a circumstance that could enter into the consideration of the question whether the said naptha launch would be an appurtenance of the said yacht 'Carmita'; which question, however, could only be considered in the absence of the written contract between the libellant's agents and the claimant, and hereinafter fully set forth, specifically conveying the said naptha launch to this claimant.

Fifth. The averment in the fifth paragraph of the said libel that Gardiner & Cox were agents to sell the said yacht 'Carmita' this claimant admits to be true. Subsequent allegations in said fifth paragraph to the effect that 'libellant had in no respect authorized or instructed his agents to sell the naptha launch and they had in fact no authority whatsoever from the libellant to sell said launch,' this claimant respectfully submits that he is advised the same are irrelevant, immaterial and incompetent, in the absence of any averment by the libellant that this claimant had previous to the said sale notice of any want of authority on the part of the said agents, Gardiner & Cox, to sell the said naptha launch. This claimant expressly denies that there was no mention of the said launch in the contract of sale whereby the said Robert L. Forrest purchased the yacht 'Carmita' from libellant through his agents; and he further denies that the said contract of sale is contained in two letters marked 'A' and 'B,' copies of which are made part of the said libel. The real contract of sale is embodied in three writings marked 'A,'

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'B' and 'C,' copies of which are made a part of the said libel. In the paper marked 'C,' signed by Gardiner & Cox, agents of the libellant, the 'launch tender' expressly designated, as admitted distinctly in the sixth paragraph of the libel in this cause, is the 'naptha launch' libelled in this proceeding.

Sixth. The averments of the sixth paragraph of the said libel are only partially true, so far as they set up the consummation of the negotiations on April 7, 1900, between this claimant and the agents of libellant; but they fail to set forth the fact that the dictation of the said paper 'C,' called by the libellant a 'receipt,' was done by this claimant at the express request of the said agents, Gardiner & Cox, in the office of the said agents, No. 1 Broadway, in the City of New York. The said 'receipt' was typewritten by an employee of the said Gardiner & Cox, agents of the libellant, and thereupon submitted by such employee to Mr. Cox, of the said firm, who, after carefully examining the same, directed the addition of the affix 'Jr.' to Mr. Vanderbilt's (the libellant) name; and the said Cox thereupon signed the said paper in the firm name of Gardiner & Cox, as agents of William K. Vanderbilt, Jr., as appears by the copy thereof marked 'C' and made a part of the libel; and the averment of the said sixth paragraph of the said libel, that the said 'receipt' was improvidently signed by the said agents without noticing the word 'launch' was contained therein, this claimant avers is wholly untrue. As to this averment and the concluding averment of the said sixth paragraph of the libel, to the effect that the said 'receipt' was signed without the authority, knowledge or consent of libellant, this claimant respectfully submits that he is advised that they are immaterial, irrelevant and incompetent, there being no allegation that notice of any such want of authority was had by this claimant previous to the sale of the said naptha launch.

Seventh. It is true, as averred in the seventh paragraph of the said libel, that the said Robert L. Forrest upon presentation of the said 'receipt,' at the Newport Ship Yard, received and took away the yacht 'Carmita' and the said naptha launch. This claimant further avers that this was in the exercise of his legal right to the ownership of the said yacht and launch in accordance with the stipulations and effect of the contract between this claimant and the libellant through his agents as expressed in the said paper writing or 'receipt' of April 7, 1900. This claimant emphatically denies that the said naptha launch was delivered to him without authority from the libellant or anyone in his behalf; and he respectfully submits the circumstances already set forth which preceded and attended the execution of the paper writing or 'receipt' of April 7, 1900, marked 'C,' as well as the facts hereinafter set forth, in support of this denial. This claimant further denies that he was informed by Gardiner & Cox, or by anyone before taking the launch, that the libellant repudiated the sale of the launch. Only after his assumption of his ownership of the said yacht and naptha launch, and their removal to the City of Philadelphia by this claimant, the said Gardiner & Cox, agents, informed this claimant in writing that they had exceeded their authority in including the 'launch-tender,' or naptha launch, in the said sale. But this claimant respectfully submits that he is advised that in the absence of an averment that this claimant was previously informed of the exact extent of authority possessed by the said agents in the premises, an allegation of want of authority on their part to include such naptha launch is immaterial, irrelevant and incompetent; and this claimant respectfully excepts to this and similar averments in the said libel contained touching such want of authority.

Eighth. This claimant admits that demand has been made upon him to surrender possession of the said naptha launch, and that he has refused so to do; but the claimant respectfully submits that he is advised that the averment that the naptha launch was delivered to him without knowledge and consent of the libellant is immaterial, irrelevant and incompetent, in the absence of an averment that the claimant had notice and knowledge previous to the sale of the alleged want of authority on the part of the libellant's agents to make the sale of the said naptha launch.

* * * * * * * * * *

Eleventh. In addition to the facts set forth in the foregoing paragraphs of the claimant's answer in this cause, he further alleges as follows: The said Gardiner & Cox are, and have been for a long time, engaged in the business

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of selling yachts and other vessel property on commission for the respective owners thereof, and are known according to the printed title on their letterheads and business papers as Naval Architects, Engineers and Yacht Brokers. As admitted by the said libellant they were his agents for the sale of the yacht 'Carmita'; and all of the claimant's dealings and negotiations with said Gardiner & Cox were upon the justifiable assumption that every act within the scope of their authority as such agents would completely and irrevocably bind their principal, the said libellant. After agreeing with the said Gardiner & Cox, the libellant's agents in the City of New York, to purchase the yacht 'Carmita,' 'subject to my inspection being satisfactory,' and upon the further expressed conditions that 'you' (the said agents) 'will be able to furnish a complete inventory of everything' belonging to 'Carmita,' as is set forth in claimant's letter marked 'B' attached to the libel; this claimant on April 5, 1900, proceeded to Newport, Rhode Island, to inspect the said yacht and appurtenances. While there, this claimant learned from various creditable persons that the said naptha launch or 'launch-tender,' as it was more generally known, had been employed as a tender to the said yacht 'Carmita,' and was generally known and designated as the '"Carmita's" launch-tender,' and was also considered in the waters of Newport and the vicinity as an indispensable appurtenance to the yacht. The yacht 'Carmita' has a draught of eleven feet four inches, making it impossible in nearly every instance for the vessel to effect any anchorage that is not a comparatively great distance from shore; and the said naptha launch is, consequently, an absolute necessity to the said yacht. Without said naptha launch the yacht itself would be deprived of much of its utility and serviceability, its saleability impaired and its value correspondingly diminished. Wherefore this claimant after his promised inspection by him of said yacht, and as previously intimated by him, after an examination by him of 'everything belonging to the "Carmita"' upon definitely ascertaining that the said naptha launch was a natural and indispensable appurtenance of the 'Carmita,' this claimant returned to the City of New York, and proceeding to the office of Gardiner & Cox, the libellant's said agents, consummated the negotiations between them and himself, as already hereinbefore set forth, by dictating, at the express request of the said Gardiner & Cox, as accredited agents of the libellant, on April 7, 1900, the paper 'C' attached to the said libel; and which is the incontrovertible evidence of the contract between libellant and this claimant."

The grounds of exception of the libelant to the answer are as follows:

"First. Because the respondent does not aver that the firm of Gardiner & Cox, in said answer mentioned, had authority to sell the said naptha launch.

Second. Because the respondent does not deny that the said Gardiner & Cox exceeded their authority in selling the said naptha launch.

Third. Because the respondent does not aver any usage or custom by which naptha launches pass as tenders or appurtenances upon sale of a yacht.

Fourth. Because the respondent admits that the contract of sale for the yacht 'Carmita' was completed before he even knew of the existence of the said naptha launch.

Fifth. Because the only averments of the said answer to show that the said naptha launch was in law and in fact an appurtenance of the said yacht 'Carmita' are the statements of 'various creditable persons' at Newport not averred or shown to have any authority to speak upon the subject or to have any knowledge.

Sixth. Because the respondent avers that the said launch is a necessity to said yacht, because the latter was obliged to anchor at some distance from the shore, although it is admitted that the said yacht is provided with row boats.

Seventh. Because the said respondent has not well and sufficiently answered the various articles of the libel, and has entirely evaded the same and neglected to give any legal or sufficient answer thereto."

The answer does not deny that the libelant prior to and until the sale of the yacht Carmita to Forrest was the owner of the naptha

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launch. In fact Forrest lays claim to the launch under Vanderbilt. The answer avers that "this claimant's title to the said naptha launch is derived from an unimpeachable sale thereof by the accredited agents of the libelant and is complete." The substantial questions raised by the assignments of error are two: (1) whether the launch was an appurtenance of the yacht and, as such, passed in ownership to Forrest upon the sale to him of the yacht; and (2) whether, if the launch cannot be treated as such appurtenance, title to it was acquired by Forrest under the express terms of the written instrument or receipt of April 7, 1900. The libel admits that Gardiner & Cox were agents of the libelant for the sale of the yacht and that it was sold by the libelant through those agents to Forrest. The authority to sell, if not in terms extending to appurtenances, by implication included appurtenances as well as the yacht itself. But, without attempting to define the essential nature of an appurtenance of a vessel, we are clearly of opinion that the launch was not an appurtenance of the yacht. It was not and could not be carried by the yacht and did not accompany it on its trips or voyages. It did not constitute part of the yacht's outfit, nor was its use in connection with the yacht, though doubtless convenient and desirable, in any legal sense necessary to the attainment of the objects for which the latter was employed. The libel avers that the launch "in no way belonged to, was appurtenant to, nor was a tender to the yacht." The answer, it is true, expressly denies this averment and alleges that "it is the custom for such a yacht to have such a naptha launch as a tender in its service"; that "this claimant learned from various creditable persons that the said naptha launch * * * had been employed as a tender to the said yacht 'Carmita,' and was generally known and designated as the '"Carmita's" launch-tender'; and was also considered in the waters of Newport and the vicinity as an indispensable appurtenance to the yacht"; that owing to the fact that by reason of its draught the yacht is unable to anchor near shore the launch is "an absolute necessity to the said yacht"; and that the claimant "upon definitely ascertaining that the said naptha launch was a natural and indispensable appurtenance of the 'Carmita' * * * consummated the negotiations," &c. These allegations fall far short of a substantive affirmative averment of the existence of a particular custom or usage, with reference to which the sale was effected, recognizing the launch as an appurtenance of the yacht. Nor does the answer sufficiently meet the averment of the libel that the launch was not such appurtenance. While it contains a categorical denial of this averment, it nevertheless admits facts which compel us to hold, as matter of law, that the launch was not an appurtenance of the yacht and that title to it did not pass to Forrest as incident to the sale to him of the latter vessel. We are thus brought to the question whether Forrest acquired title to the launch under the written instrument or receipt of April 7, 1900. The letter of March 28, 1900, of Gardiner & Cox to Neafie-Whitaker stated that "Mr. W. K. Vanderbilt, Jr., has accepted your offer for your friend of $4,000 for the 'Carmita,' subject to her being sound and in good condition." Forrest in his reply to the above mentioned letter said: "I understand that my offer of $4,-

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000 for 'Carmita,' subject to my inspection being satisfactory, has been accepted. Owing to press of business, I will be unable to get away from here until after the middle of the coming week, when I will be in New York and go from there, with my skipper, to Newport to see the boat. I trust that we can have the transaction entirely settled without any great delay. * * * I trust that you will be able to furnish a complete inventory of everything to 'Carmita,'" &c. It appears from the answer that it was only after this correspondence that Forrest first learned that the launch "had been employed as a tender to the said yacht 'Carmita.'" Having ascertained this fact he went to the office of Gardiner & Cox and "consummated the negotiations between them and himself, as already hereinbefore set forth, by dictating, at the express request of the said Gardiner & Cox, as accredited agents of the libelant, on April 7, 1900, the paper 'C' attached to the said libel." This paper is the receipt for $4,000 from Forrest "in full payment for the yacht 'Carmita,' including her boats, launch-tender, spars, sails and complete interior and deck fittings to put her in full commission." The "launch-tender" mentioned in the receipt is the naptha launch in suit. The libel avers that, while the libelant had authorized and instructed Gardiner & Cox to sell the yacht, he "had in no respect authorized or instructed them to sell the naptha launch, and they had in fact no authority whatsoever from the libelant to sell said launch." The answer contains no denial of this averment. Its truth is practically admitted by the claimant who states that it is "irrelevant, immaterial and incompetent, in the absence of any averment by the libelant that this claimant had previous to the said sale notice of any want of authority on the part of the said agents, Gardiner & Cox, to sell the said naptha launch." The libel further avers with reference to the receipt of April 7, 1900, that "said receipt without the authority, knowledge or consent of libellant who had authorized his said agents to sell the yacht 'Carmita' only, was improvidently signed by them without noticing that the word 'launch' was contained therein." The claimant denies that the paper was improvidently signed by Gardiner & Cox without noticing the presence of the word "launch," but practically admits the truth of the allegation of the want of authority on their part, saying that "as to this averment and the concluding averment * * * to the effect that the said 'receipt' was signed without the authority, knowledge or consent of libelant, this claimant respectfully submits that he is advised that they are immaterial, irrelevant and incompetent, there being no allegation that notice of any such want of authority was had by this claimant previous to the sale of the said naptha launch." It is not disputed in the answer that Gardiner & Cox had not in fact been authorized by the libelant to sell the launch, and that the receipt was signed by them without authority from him. They were agents possessing only a special and limited authority to sell. Authority to sell one vessel cannot of itself operate as authority to sell another; and the pleadings do not show that the libelant in any manner held Gardiner & Cox out to the public or to Forrest as having authority to sell the launch. Neither their actual authority nor their undertaking to sell the yacht could clothe them with apparent authority to sell

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the former vessel. Such apparent authority could not arise from the wrongful or unauthorized act itself. Nor do the pleadings disclose ratification, acquiescence, laches, bad faith or any other conduct on the part of the libelant of such character as to preclude him from disputing the existence of authority on the part of Gardiner & Cox to sell the launch. The contention of the claimant involves the proposition that because they had been authorized by the libelant to sell the yacht the law clothed them with power to bind him by undertaking to sell on his account, and without his authority, the launch to a third person having no notice of such lack of authority. But this position clearly is untenable. Whatever claim Forrest may have against Gardiner & Cox, he acquired through them no title to the launch or right to its possession. It is unnecessary to consider in detail the assignments of error. The decree of the court below is affirmed.

(107 Fed. 743.)

THE ROANOKE.

(Circuit Court of Appeals, Second Circuit. February 7, 1901.)

No. 86.

MARITIME LIENS—REPAIRS—CONTRACT WITH SUPPOSED OWNERS.

One making repairs on a vessel in a foreign port upon the order of a supposed resident corporation, which claimed to be the owner, but was in fact a charterer without authority under its charter to incumber the vessel, cannot claim a lien for such repairs unless there is affirmative evidence showing that the credit of the ship was pledged; and, where no formal contract was made, his bare statement that the work was done on the credit of the ship is not, alone, sufficient to establish such pledge.[1]

Appeal from the District Court of the United States for the Eastern District of New York.

This cause comes here upon appeal from a decree of the district court, Eastern district of New York, dismissing a libel, with costs. 101 Fed. 298. The libel was filed to recover for repairs to the hull of the steamship Roanoke. The facts in the case are similar to those in The George Farwell (recently decided by this court) 43 C. C. A. 373, 103 Fed. 882. The steamship was owned by a resident of Indiana, had been chartered and delivered to the Manhattan Steamship Company under a charter party which required the charterer to make all repairs, alterations, and additions at its own expense, and to keep the boat free and clear of all liens, incumbrances, and debts. The Manhattan Steamship Company was a corporation organized under the laws of the state of New Jersey, but doing business in New York City, of which city the libelant is a resident.

Peter S. Carter, for appellant.

Harrington Putnam, for appellee.

Before LACOMBE and SHIPMAN, Circuit Judges.

PER CURIAM. It was held in The Farwell that "where supplies and repairs are ordered in a foreign port, not by the master, but by

[1] Maritime liens for supplies and services, see note to The George Dumois, 15 C. C. A. 679.

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the owner, there must be some affirmative evidence to show that the credit of the ship was pledged as security for payment." See, also, The Stroma, 3 C. C. A. 530, 53 Fed. 281; The Valencia, 165 U. S. 264, 271, 17 Sup. Ct. 323, 41 L. Ed. 710. We concur with the district judge in the conclusion that such affirmative evidence is lacking in this case. The libelant testified that he undertook to make the repairs in consequence of a conversation with the general manager of the Manhattan Steamship Company at his office in New York, supposing at the time that the company was a New York corporation and was the owner of the Roanoke. The whole of that conversation, as detailed by libelant, consisted in a statement by the general manager that "he had purchased these ships on the Lakes,—three of them, I think, three or four,—he and Mr. Hilman, and that the Roanoke had been ashore and wanted some repairs." No formal contract was entered into for making the repairs. The ship arrived at libelant's place a week later, and the repairs were made by day's work. There is in all this no "evidence to show that the credit of the ship was pledged as security for payment," and the bare statement of the libelant, in answer to a specific question, that he did this work on the credit of the ship, will not supply the deficiency, where there is no fact or circumstance tending to show such pledge.

Objections to the introduction of certain letters and telegrams have been argued, but, in view of the conclusion above indicated, it is unnecessary to discuss them. The decree of the district court is affirmed, with costs.

(107 Fed. 753.)

DAVIS v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. April 13, 1901.)

No. 891.

1. CIRCUIT COURT OF APPEALS—JURISDICTION—CONVICTION OF CONSPIRACY.
   Section 5, Cir. Ct. App. Act March 3, 1891 (31 C. C. A. viii., 90 Fed. viii.), amended by Act Feb. 18, 1895 (31 C. C. A. xlii., 90 Fed. xlii.), makes the criminal jurisdiction of the supreme court dependent on whether the crime of which a party has been convicted is capital; and hence where an indictment for conspiracy involves also a charge of murder in aggravation thereof, but conviction is for conspiracy only, the circuit court of appeals has jurisdiction, the latter offense not being capital.

2. CIVIL RIGHTS—CONSPIRACY TO PREVENT EXERCISE—FELONY IN CONNECTION THEREWITH—DISTINCT OFFENSES.
   Rev. St. U. S. §§ 5508, 5509, defining the offense of conspiracy to injure or intimidate citizens in the exercise of civil rights, and subjecting an offender, who has been guilty of a felony in connection therewith, to the punishment prescribed therefor by the state law, does not contemplate two distinct offenses against the United States; the conspiracy only being of federal cognizance, and made punishable, and the other crime being merely an aggravation thereof, so that if the conspiracy is not proved there can be no conviction for the felony.

3. SAME—EVIDENCE—SUFFICIENCY.
   If, in a prosecution for conspiracy under such statute, the evidence shows a detail of facts and circumstances in which the alleged con-

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spirators are involved, separately or collectively, and which are clearly referable to a preconcert of the actors, and there is a moral probability that they would not have occurred as they did without such preconcert, it is sufficient if it satisfies the jury beyond a reasonable doubt.

4. SAME—VIOLATION OF REVENUE LAWS—CONSPIRACY TO PREVENT ARREST—EVIDENCE—MOTIVE.

In a prosecution for conspiracy under such statute, the alleged purpose of which was to prevent the arrest of defendant and others for violating the revenue laws, and including the crime of murder in aggravation thereof, a neighbor of defendant was allowed to testify that at the time when the officers attempted defendant's arrest, and a deputy marshal was killed, that defendant had a still, which at one time was east of his house, and then on the west side thereof. Another witness testified that he frequently visited defendant's house before the deputy was killed, and bought whisky of him; that he let defendant know he wanted it, and would lay his money down in a certain place, and after going back would find a bottle of whisky there and the money gone. Deputy marshals were allowed to testify that on a visit which they made to defendant's place a year or two before the occurrence in question they found whisky in jugs concealed about the premises, and that, on attempting to continue their search down a ravine leading from defendant's house, the latter and another appeared with guns, and compelled them to turn back. *Held*, that this evidence was properly admitted to prove the object and purpose of the conspiracy, and explain defendant's motive in entering into it, and in resisting the officers by firing on them and killing one of their number.

5. CRIMINAL LAW—OBJECTION TO EVIDENCE—SUFFICIENCY.

An objection to the admission of evidence that it is incompetent is not available on writ of error, as it is not specific, and does not distinctly indicate the grounds of the objection.

6. SAME—ISSUE OF GOOD CHARACTER—CROSS-EXAMINATION OF DEFENDANT'S WITNESSES.

Accused having tendered evidence of his good character relating to a period continuing to the time of the trial, the prosecution was properly permitted to contradict the same on cross-examination of a witness for accused, showing that he had previously been sent to the penitentiary for a different offense.

7. VIOLATION OF REVENUE LAWS—PROSECUTION—CONSPIRACY TO PREVENT ARREST—TRIAL—INSTRUCTIONS.

In a prosecution under Rev. St. U. S. §§ 5508, 5509, for conspiracy, the alleged purpose of which was to prevent the arrest of defendant and others for violating the revenue laws, including a charge of murder in aggravation thereof, the court, having particularly in mind the period within which the conspiracy might have been formed prior to its execution, charged that it would be sufficient to establish it if defendant knew that the United States officials were coming for his lawful apprehension and arrest, and that then and there he and those associated with him, or any one or more of them, and named as his co-conspirators in the indictment, determined to resist the proposed or threatened arrest by force of arms, if necessary, or by flight; or if previously to that, at a time more or less remote, defendant and the alleged conspirators, any one or more of them, knew that the officers were coming wherever he might be, with lawful process to arrest defendant, and determined that they would resist, by his flight and their assistance to that end, or by force of arms, if necessary. *Held*, that the jury must have understood that the conspiracy, to be within the statute, must have included an agreement to resist the arrest of accused by force of arms, if the attempt to effect his escape by flight should fail, and that, thus construed, the instruction was not erroneous.

In Error to the District Court of the United States for the Western District of Tennessee.

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The respondent in this case, now plaintiff in error, was convicted at the April term, 1900, of the district court for the Western district of Tennessee, of the offense defined by section 5508 of the Revised Statutes of the United States; that is to say, of having conspired with other persons to injure, oppress, threaten, and intimidate certain citizens of the United States in the free exercise and enjoyment of the right and privilege secured by the constitution and laws of the United States while searching for, and endeavoring to arrest, the plaintiff in error and other parties named in an indictment for violating the internal revenue laws, which had been found by the grand jury at a session of the said district court. The citizens mentioned consisted of the marshal and some deputy marshals of the United States for that district, and a posse whom the marshal had called to his aid in executing a warrant of arrest founded upon the above-mentioned indictment. The indictment charged the accused, not only with the conspiracy, but also with having, in the execution thereof, shot and killed one Garner, a deputy marshal, thereby having committed the crime of murder, which, by section 5509, is made an aggravation of the principal offense, and subjects the offender to the punishment prescribed by the law of the state for such a crime. The jury found the plaintiff in error guilty of the conspiracy, but not guilty of the murder, and he was sentenced to 10 years of imprisonment, and to pay a fine of $5,000. Thereupon he brought the case here upon a writ of error, assigning errors in certain rulings of the court upon the trial, and in overruling a motion for a new trial and in arrest of judgment. See 103 Fed. 457.

W. A. McDougall, for plaintiff in error.
George Randolph, U. S. Dist. Atty.

Before LURTON and SEVERENS, Circuit Judges, and CLARK, District Judge.

SEVERENS, Circuit Judge, having made the preceding statement of the case, delivered the opinion of the court.

A question was suggested by the district attorney at the hearing, though the point was not pressed, whether this court has appellate jurisdiction in the case. Reference was made to certain cases where the statute founds the jurisdiction to review upon writ of error the proceedings of the trial court upon the character of the offense charged in the indictment. But here the test of jurisdiction is the character of the offense of which the party has been convicted. The distinction is quite clear. In the present case the party has been convicted of conspiracy only, which is not a capital offense, and therefore is within the appellate jurisdiction of this court, and not that of the supreme court. Section 5, Cir. Ct. App. Act March 3, 1891 (31 C. C. A. viii., 90 Fed. viii.); amended by Act Feb. 18, 1895 (31 C. C. A. xlii., 90 Fed. xlii.).

Counsel for the plaintiff in error, who submits the case on a brief, alleges six grounds on which he contends for a reversal of the judgment, the first two of which may be considered together. They are:

"First. In the first place, we insist that the indictment does not charge the crime of conspiracy as such, but alleges the existence of the conspiracy for the sole purpose of giving the court jurisdiction of the crime of murder. Second. The crime of murder and the crime of conspiracy are two separate and distinct offenses, and the crime of murder does not include or embrace the crime of conspiracy, and the defendant cannot be tried for two separate and distinct offenses at the same time."

These contentions are based upon a misconception of the effect of sections 5508 and 5509. They do not contemplate two distinct

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offenses against the United States. Only the conspiracy is of federal cognizance, and it is that offense which is made punishable. If, in the prosecution of it, a thing is done which is a crime by the laws of the state, the conspiracy is punishable by a measure of punishment equal to that prescribed by the law of the state for such other crime. But it is an aggravation merely of the substantive offense of conspiracy. If the latter is not proven, there can be no conviction for the offense which constitutes the aggravating circumstance, and the proceeding falls to the ground. It is plainly indicated in Motes v. U. S., 178 U. S. 458, 20 Sup. Ct. 993, 44 L. Ed. 1150, that this is the view taken of these sections by the supreme court. It cannot be doubted that it was within the power of congress to deal with such a conspiracy and impose such punishment therefor as it should deem proper; and, having such authority, it was competent to take notice of such incidents of violence and wrong as were likely to happen in the prosecution of such combinations, and to measure the punishment by that which is prescribed by the local law for such acts when made, of themselves, the subject of punishment. Though measured by those laws, the penalty is imposed by the law of the United States.

It is next contended that there is no adequate evidence of the conspiracy charged in the indictment upon which the verdict of the jury can be sustained. This might be so if it were necessary to prove the combination by distinct and formal agreement. But, as we held in the case of Reilley v. U. S. (recently decided) 106 Fed. 896,[1] this is not necessary. If the evidence shows a detail of facts and circumstances in which the alleged conspirators are involved, separately or collectively, and which are clearly referable to a preconcert of the actors, and there is a moral probability that they would not have occurred as they did without such preconcert, that is sufficient if it satisfies the jury of the conspiracy beyond a reasonable doubt. We have considered the evidence, and think it ample to convince the jury that there was a common understanding between the plaintiff in error and others in his neighborhood, some of whom are mentioned in the indictment, to warn each other of the approach of federal officers, coming to enforce the revenue laws, and to resist them by violent means, if necessary to prevent the service or execution of process. The evidence tends strongly to show that the plaintiff in error himself fired the fatal shot by which the deputy marshal lost his life, and it is not easy to see how any other conclusion could be reached than that this killing was one of the contemplated results of the combination. But the jury did not find the murder charged to have been committed by the plaintiff in error. It may have been one of those compromises which sometimes take place in the jury room. It is enough that they were justified in finding, at least, the conspiracy.

The fourth point made is that the district attorney was permitted, over the objection of the defendant, to introduce proof of other offenses, entirely separate and distinct from that for which he was

[1] 46 C. C. A. 25.

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on trial. The first specification under this head is upon the overruling of an objection to a question of the district attorney put to a witness, McDuffy, who was living near by the plaintiff in error at the time when the officers attempted his arrest and Garner was killed. The question was, "Did you know anything about George Davis having a still there?" to which the objection was made that it related to another violation of law, entirely distinct and separate from that for which the respondent was being tried. The objection being overruled, the witness testified that Davis did have a still there; that it was at one time east of his house, "and then he had it on the west side." We think it was competent to show the fact called for by the question. It was admissible to prove the object and purpose of the alleged conspiracy, and explain the motive of the respondent in entering into it, and in resisting the officers by firing upon them and killing one of their number. The objection was properly overruled.

The second specification relates to the admission of testimony by another witness, who testified that he frequently visited Davis' house before Garner was killed, and bought whisky of him; that he let Davis know he wanted it, and would lay his money down in a certain place, and afterwards, going back, would find a bottle of whisky there and the money gone. For the reason above stated, this evidence was also admissible. It was relevant to the question of the motive for the conspiracy alleged. Then, further, we are referred to five or six pages of testimony given by a deputy marshal relating to a visit he made at Davis' place a year or two before the occurrence in question. He stated that he found whisky in jugs concealed about the premises, and that, on attempting to continue his search down a ravine in an easterly direction from the house, Davis and another party appeared on the ridge along the side of the hollow, with guns in their hands, and forbade them from going in that direction any further, and compelled them to turn back. The objection was that it was not a part of the transaction in question, and therefore incompetent. The court did not err in receiving the testimony. Like that already considered, it was competent for the same purpose. Another deputy marshal was a witness who accompanied the deputy last mentioned upon the occasion testified about by the latter. His testimony was of a similar character, and received over a like objection. It was properly received, for the reason already stated.

The fifth allegation of error made in the brief of counsel is "that the district attorney was permitted, over the objection of defendant, to prove that the defendant had been sent to the penitentiary on a former occasion and for a different offense"; referring to the testimony given on cross-examination of one of defendant's witnesses, in reference to an occurrence at a session of the district court in 1895. The district attorney put this question, "Was not that the same time George Davis was sent up?" to which the witness answered, "It was." Thereupon, the record states, defendant's counsel excepted to this question and answer for incompetency, but the exception was overruled. Without determining whether the

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objection should have been taken before the answer was given in order to be available, and treating the exception as equivalent to an objection and exception seasonably made, the fact remains that no sufficient ground therefor was assigned. The suggestion that the testimony was incompetent amounts to nothing. It is no more effective for the purpose of directing the attention of the court to any ground on which the objection might be supposed to rest than a mere objection without specifying any reason. That an objection to evidence without the assignment of any ground or reason therefor is not sufficient to save a question upon its being overruled has been repeatedly adjudged in this and other courts. Patrick v. Graham, 132 U. S. 627, 10 Sup. Ct. 194, 33 L. Ed. 460; District of Columbia v. Woodbury, 136 U. S. 450, 10 Sup. Ct. 990, 34 L. Ed. 472; Mitchell v. Marker, 10 C. C. A. 306, 62 Fed. 139, 25 L. R. A. 33; Railroad Co. v. Hellenthal, 31 C. C. A. 414, 88 Fed. 116; Reilley v. U. S. (recently decided by this court) 46 C. C. A. 25, 106 Fed. 896; Railway Co. v. Charless, 2 C. C. A. 380, 51 Fed. 562; U. S. v. Shapleigh, 4 C. C. A. 237, 54 Fed. 126; Railway Co. v. Henson, 7 C. C. A. 349, 58 Fed. 531; Minchen v. Hart, 18 C. C. A. 570, 72 Fed. 294. In Mitchell v. Marker, supra, where the objection was general, Judge Lurton, delivering the judgment of this court, said: "The assignment is bad. The ground of the objection was not stated to the court below. The exception was a general one." "The cases are numerous which hold that, to avail on writ of error, an objection to evidence must be specific, and distinctly indicate the grounds upon which the objection is made." Sometimes a limitation of this rule has been suggested which would exclude its application where the evidence offered was not admissible for any purpose. The difficulty would still be that it would devolve upon the judge the necessity for determining, upon the spur of the moment, whether the objection is made for that reason, or upon some other, and what, reason present to the mind of counsel, but not stated. Said Mr. Justice Miller, in delivering the opinion of the court in Patrick v. Graham, supra: "It cannot be permitted that after a case has gone to a hearing, testimony submitted to the jury, and a verdict rendered, a party for the first time shall state a reason for his objection to that evidence which would make that objection good." So here, the first time when any reason is stated, or hinted at, is in the brief of counsel upon the present hearing. But, if we assume the rule to be as modified by the exception, it remains that the evidence was of a fact bearing upon the question of the character of the defendant which was put in issue by his tendering evidence that it was good, and that evidence related to a period continuing to the time of the trial.

It is further contended that the charge of the court was prejudicial to the defendant, and had a tendency to impress upon the minds of the jury the idea that it was their duty to convict. No specific error in matter of law is pointed out in this connection, but it is contended, in substance, that the language of the judge betrayed a strong leaning against the defendant. But we do not think there is any ground for complaint in this regard. The instructions state

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the law clearly, and the judge told the jury that they were to determine the facts by their own judgment. The province of the judge was certainly not transgressed.

Another question is presented by an exception taken to the charge of the court to the jury in reference to the subject of the conspiracy. The presiding judge in that part of his instructions, having more particularly in mind the period of time within which the conspiracy might have been formed prior to the execution of its purpose, charged the jury that it would be sufficient to establish the charge of conspiracy in the indictment if the defendant knew that the United States officials were coming for the lawful purpose of his apprehension and arrest, and that then and there he and those associated with him, or any one or more of them, and named as his co-conspirators in the indictment, determined to resist the proposed or threatened arrest by force of arms, if necessary, or by flight; or if previously to that, at a time more or less remote, the defendant and the alleged conspirators, any one or more of them, knew that the officers were coming wherever he might be, with lawful process to arrest the defendant, and determined that they would resist that arrest, by his flight and their assistance to that end, or by force of arms, if necessary. The objection made to this instruction is not that it was erroneous in respect to the time when the conspiracy might have been formed, but that it was error to charge that a conspiracy to resist the arrest by effecting the defendant's flight would be sufficient to make out the case in that aspect of it. If the instruction were such as the counsel assumes it to have been, it would present a serious and very important question. But we think the objection rests upon a misconstruction of the charge. The court did not tell the jury that a conspiracy to effect an escape by flight, and to do that only, would bring the case within the statute. The instruction was that if the conspiracy was to effect his escape by flight, if they could, and, further, if that could not be accomplished, then by force of arms, that would be sufficient. The way in which the judge puts the alternative in the first paragraph might, perhaps, bear the construction attributed to it. But in the second the language indicates that he meant to include resistance by force of arms, if necessary. And that is not an unnatural construction of the first paragraph also. Taking the whole charge upon this subject into view, we think that the jury must have understood that the conspiracy, in order to be within the statute, must have included an agreement to resist the arrest of the accused by force of arms, if the attempt to effect his escape by flight should fail; and this, we think, was not erroneous. None of the grounds relied upon for reversing the judgment being sustained, it must be affirmed.

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(107 Fed. 759.)

COLE v. GARLAND et al.

SAME v. McCALL et al.

(Circuit Court of Appeals, Seventh Circuit. April 9, 1901.)

Nos. 759, 760.

1. REMOVAL OF CAUSES—REMANDING ORDER—ERROR THEREFROM.
Under 24 Stat. 553, c. 373, § 6, repealing 18 Stat. 472, c. 137, § 5, which authorized a writ of error or appeal from an order remanding a cause to a state court; and 24 Stat. 553, c. 373, § 2, providing that whenever any cause shall be removed from any state court into any circuit court of the United States, and the circuit court shall remand the cause to the state court, no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed,—a writ of error from an order of a United States circuit court remanding a cause to the state court would be dismissed, the appropriate remedy being error to the state supreme court, should that court determine the question of federal jurisdiction adversely.

2. SAME.
Under 24 Stat. 553, c. 373, forbidding appeal or error from an order remanding a cause from a federal to a state court, but providing that nothing therein contained should be held to repeal or affect any jurisdiction or right mentioned in Rev. St. § 641, which provides that "on the petition of defendant" in certain cases a cause may be removed to the federal courts, the contention of the plaintiff in a suit brought in a state court that his right to removal was founded on such section 641, and therefore he had a right to bring error from an order of the federal court remanding the cause, was idle, since right to removal under section 641 is limited to a defendant.

3. SAME.
The contention of a party to a suit brought in a state court that his right to removal of the cause to a federal court was founded on Rev. St. § 641, and no right mentioned therein was affected by 24 Stat. 553, c. 373, forbidding error or appeal from an order of a federal court remanding a cause to a state court, and therefore he had a right to bring error from an order so remanding a cause,—could not prevail, since such section 641 conferred no right to review such an order.

In Error to the Circuit Court of the United States for the Western District of Wisconsin.

The plaintiff in error, on April 17, 1900, brought suits in the circuit court for Price county, Wis., upon money demands,—one against F. S. Garland for $1,000.75, and one against Alexander McCall for $125. In each of these suits a writ of attachment was issued and levied upon certain lumber of the appraised value of $1,288, claimed to belong to the defendant in such suit. Thereafter the Bank of Hamilton, a corporation created under the laws of the dominion of Canada, and located at Hamilton, in the province of Ontario, claiming to be the sole owner of the property upon which the writs of attachment had been levied, petitioned the court that it be allowed to come in as a party defendant in the cause to establish and defend its rights to the property, in conformity with the provisions of the statute of Wisconsin (2 Sanb. & B. Ann. St. Wis. p. 1935, § 2751a), which is as follows: "Any person not a party to the action, whose property is attached, may, at any time, either before or after judgment, be made a party upon his application for the purpose of removing or discharging the attachment. The court may grant such summary relief as shall be just, and may in proper cases award an issue for trial by jury." Thereupon, on August 1, 1900, the court ordered that the Bank of Hamilton be made a party defendant to the cause for the purposes stated in

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the petition, and that proper pleadings be filed touching the title to the attached property. On September 27, 1900, the plaintiff in error filed in each suit his petition for the removal of the cause into the circuit court of the United States for the Western district of Wisconsin, upon which an order of the state court was entered in each of such suits September 29, 1900, granting the prayer of the petition, and directing such removal. The petition does not charge, nor does the record show, the amount in controversy to equal or exceed the sum of $2,000. It states as grounds for removal: 'That the Bank of Hamilton, which is a corporation organized and existing and doing business under the laws of Ontario, Canada, and which is a Canadian corporation, claims and asserts ownership as against the petitioner to certain property named in its petition, and claims and asserts the same as a cause of action arising under the laws and constitution of the United States. That the state of Wisconsin has made and enforces and has enforced in this action section 2751a of the Wisconsin Statutes of 1898, which denies to your petitioner within the state of Wisconsin the equal protection of the laws, contrary to and in violation of the fourteenth amendment of the constitution of the United States, and your petitioner is deprived and cannot enforce in the judicial tribunals of the state of Wisconsin, and is wholly unable to obtain in the circuit court of Price county the enforcement of section 1770b of the Wisconsin Statutes of 1898, as amended, thus denying to your petitioner his equal civil rights and the equal protection of the laws by the circuit court of Price county, Wisconsin, within its jurisdiction. That the state of Wisconsin has made and enforces and has enforced in this action section 2751a of the Wisconsin Statutes of 1898, and that such section wholly deprives your petitioner upon any issue or issues raised or which may be raised by the said Bank of Hamilton, and by its petition, of a constitutional jury, contrary to and in violation of section 5 of article 1 of the constitution of the state of Wisconsin, thereby making and enforcing a law which abridges the privileges and immunities of citizens of the United States, and which deprives your petitioner of his property without due process of law, and which denies him within the state of Wisconsin and within its jurisdiction the equal protection of its laws upon the trial of any and all issues raised by the said Bank of Hamilton, and its said petition and claims of ownership; and that the state of Wisconsin denies the same within its jurisdiction by said section 2751a of the Wisconsin Statutes of 1898, contrary to and in violation of the fourteenth amendment to the constitution of the United States, and by the said section 2751a of the Wisconsin Statutes of 1898 your petitioner is prevented from, and is not entitled to, and is denied such common-law and constitutional jury in the state wherein said controversy is now pending. That the state of Wisconsin has made and is enforcing section 2751a of the Wisconsin Statutes of 1898 in said action, which law is a special proceeding depriving citizens of the state of Wisconsin of a constitutional jury. Your petitioner hereby asserts and claims in this controversy the protection of the seventh amendment of the constitution of the United States in the circuit court of Price county in this controversy between the said Bank of Hamilton, which is a Canadian corporation, which has not complied with section 1770b of the Wisconsin Statutes of 1898, as amended, governing foreign corporations, and your petitioner, who is a citizen of the state of Wisconsin. That any and all rights and claims of the said Bank of Hamilton arise under the constitution and laws of the United States, and the same is a suit at common law, where the value in controversy exceeds twenty dollars. That the said Bank of Hamilton asserts such rights, notwithstanding section 1770b of the Wisconsin Statutes of 1898, upon the contention and claim that said section 1770b of Wisconsin Statutes of 1898 impairs the contract and obligation upon which the bank claims its cause of action is based, and out of which it arises; and that said section 1770b is contrary to and in violation of the constitution of the United States, and is null and void." Section 1770b, referred to in the petition, provides that, with certain exceptions, not necessary to be stated, no corporation foreign to the state of Wisconsin shall transact business or acquire, hold, or dispose of property in the state until a duly authenticated copy of its charter shall be filed with the secretary of state; imposes a penalty for failure to comply with the statute; and declares that every contract

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made by such corporation affecting its personal liability or relating to property within the state before compliance with the law shall be wholly void on its behalf, but enforceable against it. On December 4, 1900, the court below remanded the causes to the state court whence they had come, and these writs of error are sued out to review the judgment or order of the court directing such remand. Motions are now made to dismiss the writs of error upon the ground that the so-called judgment remanding the cause is an interlocutory order, and not reviewable.

H. C. Peters, for plaintiff in error.

Rublee A. Cole, for defendant in error.

Before WOODS, JENKINS, and GROSSCUP, Circuit Judges.

JENKINS, Circuit Judge, after the foregoing statement of the case, delivered the opinion of the court.

Before the act of March 3, 1875 (18 Stat. 472, c. 137, § 5), an order remanding a cause was not reviewable, because not a final judgment or decree in the sense which authorizes a writ of error or appeal. Insurance Co. v. Comstock, 16 Wall. 258, 270, 21 L. Ed. 493; Railroad Co. v. Wiswall, 23 Wall. 507, 23 L. Ed. 103. That act gave for the first time a writ of error or appeal. The last clause of section 2 of the act of 1887 (24 Stat. 553, c. 373, § 2), as corrected by the act of 1888 (25 Stat. 435, c. 866), provides:

"Whenever any cause shall be removed from any state court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the state court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed."

And section 6 of that act repeals the paragraph of section 5 of the act of 1875 allowing an appeal or writ of error from an order of remand to the state court. Since that act there is no power to review by appeal or writ of error an order of the circuit court remanding a cause to a state court. Morey v. Lockhart, 123 U. S. 56, 8 Sup. Ct. 65, 31 L. Ed. 68; Railroad Co. v. Thouron, 134 U. S. 45, 10 Sup. Ct. 517, 33 L. Ed. 871; Railroad Co. v. Roberts, 141 U. S. 690, 12 Sup. Ct. 123, 35 L. Ed. 902; Railroad Co. v. Brown, 156 U. S. 386, 15 Sup. Ct. 656, 39 L. Ed. 461. The fifth section of the act of 1887 provides that nothing therein contained "shall be held, deemed, or construed to repeal or affect any jurisdiction or right mentioned" in section 641 of the Revised Statutes of the United States. It is claimed by the plaintiff in error that his petition for removal from the state court is founded upon this section of the Revised Statutes, and the protection of the fourteenth amendment to the constitution is invoked because of supposed discrimination, and of the seventh amendment because of supposed denial of a trial by jury by section 2751a of the Revised Statutes of Wisconsin, and that, therefore, he is within the proviso of the fifth section above mentioned. If his claim were otherwise clear, it is difficult to appreciate its force, since he was plaintiff in the suit, and the right of removal under section 641 is limited to a defendant. The contention is, however, unsound. By section 641 no right to review a remanding order is conferred. The act of 1875 gave this right of review generally in all cases of removal. This was subsequent to

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the enactment of section 641. The act of 1887, taking away the right to an appeal or writ of error from a remanding order, does not repeal or affect any jurisdiction or right mentioned in section 641, for no such right to a review was there given. The same jurisdiction and right granted by section 641 exist now as before the act of 1887 taking away the right of review, and as before the act of 1875 granting a review. The proviso of the statute was doubtless out of abundant caution lest the clause repealing all acts inconsistent or repugnant might be held to do away with the civil rights statute. If, as he would seem to suppose, the plaintiff in error has shown a right to have his cause determined in a federal court, and the court below has improperly remanded it, his appropriate remedy is by writ of error to the supreme court of the state, if that court shall determine the question of federal jurisdiction adversely; the power to afford a remedy by mandamus, as well as the right to a writ of error or to an appeal, being taken away by the acts of 1887 and 1888. Ex parte Pennsylvania Co., 137 U. S. 451, 11 Sup. Ct. 141, 34 L. Ed. 738. The writs of error are dismissed.

(107 Fed. 771.)

GENERAL ELECTRIC RY. CO. v. CHICAGO, I. & L. RY. CO.

(Circuit Court of Appeals, Seventh Circuit. April 13, 1901.)

No. 567.

1. EQUITABLE RELIEF IN FEDERAL COURTS.
   The federal courts decide for themselves whether for an actual or threatened invasion of a conceded or asserted right equity may afford relief.
2. STREETS—PUBLIC USE—LOADING AND UNLOADING FREIGHT—INTERFERENCE BY TRESPASSER—PROTECTION IN EQUITY.
   The appropriation, whether by custom or ordinance, of a street adjacent to a railroad freight house to the use of teams, trucks, and wagons in loading and unloading merchandise, is a legitimate public use of the street, of such importance that a mere trespasser, seeking to interfere therewith, should receive scant favor from a court of conscience.
   Seaman, District Judge, dissenting.

On Rehearing.

Edwin Walker and Thomas A. Moran, for appellant.
Geo. W. Kretzinger and E. C. Field, for appellee.

Before WOODS and JENKINS, Circuit Judges, and SEAMAN, District Judge.

WOODS, Circuit Judge. The decision in this case was handed down on January 12, 1900 (39 C. C. A. 345, 98 Fed. 907), but, in deference to the opinion of the supreme court of Illinois in the case of General Electric Ry. Co. v. Chicago & W. I. R. Co., 184 Ill. 588, 56 N. E. 963, which was claimed to have put upon the Doane Case, 165 Ill. 510, 46 N. E. 520, an interpretation essentially different from that which we had adopted, a rehearing was granted. Besides the original briefs and argument, additional briefs were filed,

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and an oral argument, nominally in another case, was heard in support of the petition for rehearing; and, after the granting of the petition, further briefs were filed, and full argument at the bar of the court was again heard. Upon reconsideration of all these arguments and briefs, we abide by our first conclusion.

It is urged by counsel for the appellee that the case is not one in which the decisions of the state courts should be recognized as controlling, but is one of general equity, in which this court should exercise an independent judgment. We do not find it necessary, however, to rule upon the question. If the decisions of the state court do not relate merely to the question of remedy, but are to be regarded as determining the right of the abutting owner, denying him all damages, however real and substantial, beyond what a court of law may estimate, they should, perhaps, be followed; but if, conceding the full right, they mean that the appropriate and only remedy is such as the courts of law can give, they are not binding. The federal courts decide for themselves whether, for an actual or threatened invasion of a conceded or asserted right, equity may afford relief.

The Chicago & W. I. R. Case contains nothing to modify our understanding of the opinion in the Doane Case, the different parts of which only upon that understanding can be harmonized with each other, with the decisions of other courts therein cited, with a later opinion of that court, with settled principles of equity, and with an enlightened sense of justice and right. The case was treated by counsel and by the court as one involving only compensable injury. The report of the case contains an abstract of the brief or argument for the appellee, in which there is not even a suggestion that the injury alleged was not remediable at law; and, according to the opinion, nothing more was alleged in the bill or insisted upon in argument, and no showing was made that the ordinance under which the work was being prosecuted was void for lack of power in the city council to pass it. The opinion contains no reference to the decision of this court, though it had been handed down some weeks before, and no mention of the distinction which we made between this case, as involving an irreparable injury, and the Doane Case, as involving nothing for which an adequate remedy could not be had in an action at law. The charge in the bill in the Chicago & W. I. R. Case, according to the opinion, was—

"That the laying of tracks and operating the street railroad upon the streets in the manner set out in the bill would take from the appellee property, and prevent ingress and egress to and from its property, and thus injure and practically destroy a large part of its property and improvements for the uses and purposes for which they were made."

And, proceeding, the opinion says:

"The bill alleges and sets up facts charging that the ordinance under which the appellant claims the right to erect its track upon said street was obtained by procurement and fraud."

And on the next page it is added:

"The decree restraining the street-railway company from laying its tracks on Custom House Place and on Plymouth Place is based upon the alleged

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right of the abutting owner to enjoin the erection of a street railway in the street, because there is no valid ordinance authorizing its structure, and because such street-car tracks injuriously affect the appellee, as an abutting owner. The injunction which prevents the building of a street railway across the tracks of a steam railroad on Fourteenth street is based upon the alleged ground that the crossing of the railroad track by the track of the street-railway company at grade is a physical taking of the steam-railroad company's property, and an invasion of its property rights, whereby its property is damaged, and the profitable use thereof diminished."

Then, after declaring that the question "whether or not the right of an abutting property owner to enjoin the construction of a street railway in the streets of a city or village on the grounds that the property of an abutting owner would be injuriously affected or damaged as a consequence of the building of such street railway, or that the street railway is without legal authority, is not an open question in this state," and after quoting from the Doane Case, the opinion proceeds:

"The allegation of an abutting property owner that the construction and operation of a street railway in front of his property will lessen its value or injuriously affect it, or the allegation that the construction of the street railway in the street is illegal or unauthorized, will not give such abutting property owner a standing in a court of equity to enjoin the construction of such road."

In all this there is no inconsistency with anything in the opinion of this court, and there is certainly nothing which can be said to so broaden the Doane decision, either in terms or in principle, as to cover a case of irreparable injury; and that the opinion was not intended to put upon the decision in the Doane Case an interpretation which should include cases of irreparable wrong is still the more probable, because in the case of Pennsylvania Co. v. City of Chicago, 181 Ill. 289, 54 N. E. 825, 829, written by the same judge, a contrary understanding had been distinctly indicated. In that case, as in the Doane Case, it was held that the Pennsylvania Company, owning the abutting property, could not have an injunction to restrain the city from establishing a hack stand in the street in front of the north end of the Union Station for passengers, because it had a complete remedy in an action for damages for any use of the street inconsistent with its rights; but in the concluding paragraph of the opinion the distinction, which, as we think, is plain and is unequivocally recognized in the Doane decision, is reaffirmed in this expression, "These complainants cannot, in the interest of the public, resort to this remedy, and have shown no special or peculiar injury to their property, entitling them to an injunction." Why was this said, if in no case, whatever the character of the injury, the individual owner of property, in order to clear his way into a court of equity, where alone protection can be had against wrongs irremediable at law, may not assert the invalidity of an ordinance which, if assailed in the name and interest of the public, is confessedly void? Ordinarily a void thing may be ignored by any one concerned. On considerations of public policy it has been ruled, and doubtless wisely, that an individual, asserting only an injury for which suitable compensation may be obtained at law, may not attack a public ordinance formally adopted, and under which a pub-

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lic work, perhaps of great importance, is being prosecuted; but if the doctrine is to be applied when private injury is about to be inflicted, for which the relief obtainable at law could not be even approximately adequate, it becomes a bald denial of justice. The like of it has found recognition thus far, we believe, only in briefs, to which, in the face of criticism at the bar of the court, counsel have not shown an unflinching adhesion. Indeed, the contention advanced—that a street-car line not being a burden upon the street upon which it is laid, beyond what was contemplated when the street was laid out and dedicated to the public use, the abutting owner is estopped to claim damages arising from the construction and operation of a street railway in front of his premises—proves too much. If it demonstrates that the abutting owner cannot have an injunction against a peculiar and irreparable injury, it shows with equal conclusiveness that he may not sue at law for a peculiar injury of a character that admits of compensation in damages. In the nature of things and on principle there is the same right to go into equity for an injunction against a threatened irreparable injury as there is to go into a court of law to recover damages for a compensable wrong. If the laying of the street railway be duly authorized, as by a valid ordinance, there can, of course, be no injunction, if there be no actual taking of property outside of the limits of the street; and for all consequential injuries, no matter how direct and proximate, the sufferer must be content with such compensation as the courts of law can afford, however inadequate in fact; but what good reason can there be for the application of that rule, when the ordinance under which an inestimable damage is about to be inflicted is void? Why should there be an estoppel against denying the validity of the invalid,—against denouncing as void an act which is in fact void, under which it is proposed to inflict an irremediable wrong? If there were no pretense of an ordinance or of other form of authority for the proposed invasion of the street, is it to be said that the owner of abutting property threatened with injury may not have relief by injunction, but must look only to the uncertain and insufficient remedies of the law? Would a forged ordinance, put upon the records of the common council without the knowledge or consent of the body by whom it purported to have been enacted, be beyond impeachment except by a public prosecutor, who, as the supreme court of the state has held, could move only in the public interest, at the risk of the dismissal of the proceedings if shown to be for the protection of private rights,—the only rights, in most instances, likely to be imperiled? But if the work of laying a street railway, prosecuted without pretense of authority or under a forged ordinance, may be enjoined at the suit of one threatened with irreparable wrong, why should it not be enjoined in a like case if prosecuted under an ordinance which for any reason is illegal and void, not voidable merely? In either case the company prosecuting the work without authority is not in any sense a representative of the public, performing a public duty under a franchise conferred, but is simply a trespasser, exempt by right from no prosecution necessary to the protection of one injured or threatened with in-

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jury. In any such case there is no danger of a needed public work being unduly interrupted or delayed, because a court of equity, applying strictly the doctrine of laches, will not entertain a bill which shall not have been brought promptly, and before large outlays could have been made in good faith, or shall have been brought under circumstances which would make the granting of the relief sought more harmful than the wrong to be remedied or prevented. It is useless to talk of relief through the public prosecutor or the attorney general of the state. Under the decision in People v. General Electric Ry. Co., 172 Ill. 129, 50 N. E. 158, a suit by the attorney general, even though prosecuted upon the joint request and for the benefit of all or a majority of the residents and owners of property upon a street to enjoin the construction of a street railway under a void ordinance, would be subject to dismissal because prosecuted for the benefit of private interests.

There is another phase of the case, about which there was comment at the hearing, on which the opinion in the case of Pennsylvania Co. v. City of Chicago, already referred to, has an important bearing. Departing somewhat from the theory insisted upon here,—that the primary object of a street, from curb to curb, was "for the free passage of the public, and anything which impeded that free passage was a nuisance," and hence the use of Custom House Place for teams and trucks standing to load and unload at the freight house of the appellee was an unlawful appropriation of the street to private use,—the court in that case, while recognizing that in a sense the railroad company was a private corporation, and "that the use of its depot for the purpose for which the land was acquired and the building was erected, and the use of the railroad companies having access thereto could not be judicially interfered with by an ordinance of the city to the damage of the companies," yet, in view of the fact that the railroad company was in many respects a public corporation, invested with powers which made it more than a mere private body, held it to be a legitimate exercise of power by the city to establish in the street in front of the station a stand for hacks, within convenient reach of the thirty-one thousand people received and discharged daily at that station. The logic of this is that the appropriation, whether by custom or by ordinance, of the street adjacent to the freight house of the appellee to the use of teams, trucks, and wagons employed in loading and unloading merchandise in course of shipment and delivery, was a legitimate public use of the street, of such importance that a mere trespasser, seeking to interfere with it, should receive scant favor from a court of conscience. The true doctrine is, we conceive, as it was stated by the supreme court in D. M. Osborne & Co. v. Missouri Pac. Ry. Co., 147 U. S. 248, 259, 13 Sup. Ct. 303, 37 L. Ed. 161, cited with approval in the Doane Case, that "where there is no direct taking of the estate itself, in whole or in part, and the injury complained of is the infliction of damage in respect to the complete enjoyment thereof, a court of equity must be satisfied that the threatened damage is substantial, and the remedy at law in fact inadequate, before restraint will be laid upon the progress of a public work." It is, of course,

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true, as said in the next sentence, that "if the case made discloses only a legal right to recover damages, rather than to demand compensation, the court will decline to interfere"; but that plainly is meant, not to qualify the preceding statement, but to distinguish between cases of consequential injury and cases in which there has been a physical invasion or taking of property, which may be enjoined if compensation be not first made, even though the damages be slight,—courts of equity in such cases not being, as the chief justice expressed it, "curious in analyzing the grounds upon which they rest their interference"; but, if there is to be no direct taking of any part of the estate, the case will be regarded as disclosing only a legal right to recover damages, except that equity will interfere by injunction when "satisfied that the threatened damage is substantial, and the remedy at law in fact inadequate."

The order of the circuit court is affirmed.

SEAMAN, District Judge. I am constrained to dissent from the conclusion which affirms the decree in this case, for the reason that it is opposed to what I understand to be the settled rule of law in Illinois governing the rights in controversy, and to the decisions, as well, of this court, following such rule. The doctrine thus established by the cases in the supreme court of Illinois, from Moses v. Railway Co., 21 Ill. 516, to Doane v. Lake St. El. Ry. Co., 165 Ill. 510, 46 N. E. 520, and reaffirmed in the recent case of Chicago & W. I. R. Co., is substantially this: That the fee of the street is vested in the state and municipality for public use, and not in the abutting owner; that use of such street by a railway is legitimate use, and the right exists in the state, and through delegation in the city, to grant the privilege; that the question whether the power has been duly exercised by the city to make the grant can be raised on behalf of the public only, and not by an abutting owner; and finally that an abutting owner has no standing for relief by injunction against such use. This court has recognized and applied the rule of these authorities in Blodgett v. Railway Co., 26 C. C. A. 21, 80 Fed. 601, and Coffeen v. Railway Co., 28 C. C. A. 274, 84 Fed. 46, and the fact that the consequential injury in those cases was not so plainly irreparable as that which appears to be involved in the case at bar does not seem to be sufficient ground for ignoring the rule of stare decisis there approved.

(107 Fed. 777.)

DENSON et al. v. CHATTANOOGA NAT. BUILDING & LOAN ASS'N.

(Circuit Court of Appeals, Fifth Circuit. April 16, 1901.)

No. 1,028.

FOREIGN CORPORATIONS—BUILDING AND LOAN ASSOCIATIONS—LOAN IN VIOLATION OF LAW—EFFECT AS TO REPAYMENT.

A loan by a Tennessee building and loan association, through a traveling soliciting agent, to a resident of Alabama, where all the business in connection therewith was transacted, with the single exception of the association's assent thereto, made when the association had no place of

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business and authorized local agent in the state, is a violation of Const. Ala. art. 14, § 4, and Code 1896, §§ 1316, 1318, 1319, enacted pursuant thereto, prohibiting foreign corporations from doing "any business" in the state without at least one known place of business and an authorized agent therein, and hence repayment of the loan cannot be enforced.

Appeal from the Circuit Court of the United States for the Northern District of Alabama.

W. H. Denson, in pro. per.

J. B. Sizer, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. The contention herein is that the contract sought to be enforced by the bill is illegal on account of the failure of complainant to comply with the laws of Alabama prescribing the conditions under which foreign corporations may do business in that state. The laws in question are:

"Sec. 4. No foreign corporation shall do any business in this state without having at least one known place of business and an authorized agent or agents therein; and such corporation may be sued in any county where it does business by service of process upon an agent anywhere in this state." Const. Ala. art. 14.

"1316. Foreign corporations must file instrument of writing designating agent and place of business in this state.—Every corporation not organized under the laws of this state shall, before engaging in or transacting any business in this state, file an instrument of writing, under the seal of the corporation and signed officially by the president and secretary thereof, designating at least one known place of business in this state and an authorized agent or agents residing thereat; and when any such corporation shall abandon or change its place of business as designated in such instrument, or shall substitute another agent or agents for the agent or agents designated in such instrument of writing, such corporation shall file a new instrument of writing as herein provided, before transacting any further business in this state." Code Ala. 1896.

"1318. Unlawful for foreign corporation to transact business in this state before declaration filed; penalty.—It is unlawful for any foreign corporation to engage in or transact any business in this state before filing the written instrument provided for in the two preceding sections; and any such corporation that engages in or transacts any business in this state without complying with the provisions of the two preceding sections shall, for each offense, forfeit and pay to the state the sum of one thousand dollars." Code Ala. 1896.

"1319. Unlawful to act as agent of foreign corporation before such declaration is filed; penalty.—It is unlawful for any person to act as agent or transact any business, directly or indirectly, in this state, for or on behalf of any foreign corporation which has not designated a known place of business in this state and an authorized agent or agents residing thereat, as required in this article; and any person so doing shall, for each offense, forfeit and pay to the state the sum of five hundred dollars." Code Ala. 1896.

The complainant below, the Chattanooga National Building & Loan Association, is, and was at the time the loan to Mr. Denson was made, a corporation under the laws of the state of Tennessee, with its principal office in the city of Chattanooga, in that state. Among its corporate functions was the authorization, and, so far as we are advised, its sole business was, to loan its funds to its stockholders on real-estate security. It had no local office or agent in Alabama, but it had a traveling agent, whose business it was to solicit sub-

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scriptions to its stock, and to obtain applications for loans, and submit the same to the home office of the association at Chattanooga. On the 25th of April, 1895, appellant Denson, who was a resident of Gadsden, Ala., on the suggestion and at the solicitation of the agent, signed at that place a written application for 50 shares of stock in the association, complainant below, appellee in this court. This application was forwarded by the agent to whom Mr. Denson delivered it to the home office, where the stock was issued, and returned to the agent, to be by him delivered to Mr. Denson. On the same day on which he applied for his stock, Mr. Denson signed a written application to the association for a loan of $2,500 on the 50 shares of stock he had applied for. He offered a premium of $2,500 for the loan, and proposed to secure the loan and premium, if his application should be granted, by a mortgage on certain real estate in Gadsden, Ala., which he represented to be of the value in all of about $9,000. This application was accompanied by the report of two parties, selected by the association, fixing the value of the property which Denson proposed to mortgage at $8,000, and the certificate of an attorney, also selected by the association, with reference to the condition of the title. This application was forwarded by the agent to the home office in Chattanooga, where it was submitted, along with other applications, to the board of directors, by whom the application was granted, and the loan directed to be made in accordance with the charter and by-laws of the association. Thereupon a note and deed of trust were prepared at the home office, and were sent to the agent by whom Mr. Denson's application had been taken and forwarded; and at the same time the check of the association on the Chattanooga National Bank of Chattanooga, Tenn., in favor of W. H. Denson, for the sum of $2,367.50, was sent to one D. P. Goodhue, of Gadsden; with instructions to him to deliver said check to Mr. Denson when he should have executed and delivered the note and deed of trust. Upon the execution of the note and deed of trust by Denson and wife, and the delivery of the same to the agent, all at Gadsden, Ala., the agent delivered to Denson the check for $2,367.50, directing him to present the same to the First National Bank of Gadsden, which would pay the same. The check was presented to the said bank, and the face thereof paid over to Denson, as the cashier said, "under an understanding with the said building and loan association, and that the Chattanooga National Bank, on which the check was drawn, would pay the same on presentation." The note given to the association by Denson is dated at Chattanooga, Tenn., and is made payable at the home office of the association in Chattanooga; and it expressly stipulates that it "is made with reference to and under the laws of the state of Tennessee." The secretary of the association gives the following significant evidence:

"At the time the loan to defendant Denson was made, complainant association had been for some time soliciting subscriptions to stock and receiving applications for loans in the state of Alabama, and had paid a tax or license fee required under the laws of the state of Alabama for foreign corporations proposing to do business in that state; and complainant's officers supposed and understood that the payment of this fee or tax was the only condition

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with which it was necessary for them to comply in order to be entitled to do business in that state. Subsequently, however, and some months after the loan to defendant Denson was made, complainant was informed by an attorney in the state of Alabama that the Alabama statutes required foreign corporations doing business in Alabama to designate a local agent on whom process against the association could be served, and also a local place of business in that state. Thereupon complainant promptly designated such local agent and place of business, and continued up to the 2d of October, 1899, to pay the license tax or fee required of nonresident corporations doing business in Alabama, and to keep a local agent and place of business in that state."

The question presented in this case is not under the laws of which state is the contract of loan to be construed, nor in what place was the money loaned to be repaid, and this eliminates from the necessary consideration of this case very many of the adjudged cases cited in the briefs on both sides; and we may say with regard to the remaining cases cited that it is impossible to reconcile them with each other, and that (as is generally the case where the courts have in mind to compel the payment of an honest debt as against prohibitory laws) the application and construction of the particular prohibitory laws and the reasons given therefor should generally be restricted to the individual case, and for other cases considered to be more or less instructive, but never conclusive. On the facts as recited in the present case it is perfectly clear that all the business of loaning money to Denson, with the single exception that the association in Tennessee said, "Yes," was transacted in the state of Alabama, and that the contract was completed by the execution and delivery of a note and deed of trust and the payment of the money loaned, all in the state of Alabama; and the same was "doing the business for which the association was incorporated," within the meaning of the constitution and laws of the state of Alabama, as above quoted. And it may be said, if all this be not the doing of business of a foreign corporation within the prohibition of the constitution and laws of Alabama, then the National Building & Loan Association of Chattanooga, and other foreign associations engaged in the same business of loaning money on real security, may safely flood the state of Alabama with soliciting agents, make all the negotiations for loans, take real-estate securities therefor, and fully transact all other business pertaining to their corporate functions as though incorporated therein, and yet neither be obliged to have a known place of business or any authorized agent within the state, nor pay any license tax or fee, as required of nonresident corporations doing business therein. To show the construction and effect of the constitution and laws of Alabama regulating the transaction of business within the state by nonresident corporations, we cite from the decisions of the Alabama supreme court, which are without conflict on the subject:

"The real test is that applied in Beard v. Publishing Co., 71 Ala. 60: Is the corporation engaged in the transaction of business, or any part thereof, it was created and organized to transact? If it be, it 'does business' within the meaning of the constitution. If it be not,—if the act it is doing or has done is not within its general powers and franchises,—it is not the business to which the constitutional requirement is directed." Sullivan v. Timber Co., 103 Ala. 371, 380, 15 South. 941, 25 L. R. A. 543.

"The business upon the doing of which the plaintiff relied for a recovery

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was the loan of money by the defendant to a resident citizen of this state; the taking of a mortgage upon land of the borrower, situated in this state, to secure the debt, which was evidenced also by promissory notes, with separate notes for installments of the interest. Under the constitution and the statute a single act of business done without complying with the prescribed conditions is a violation of both. There need not be a carrying on of business. The loan of money here and the taking here of notes and mortgage to secure repayment, the mortgage being on land situated in this state, is the doing of business here, within both the constitution and the statute. Ginn v. Security Co., 92 Ala. 135, 8 South. 388; Farrior v. Security Co., 88 Ala. 275, 7 South. 200; Mullens v. Mortgage Co., 88 Ala. 280, 7 South. 201. And the facts that the notes and mortgage are executed here, though they may be payable elsewhere, and the land embraced in the mortgage is situated here, are sufficient to show prima facie that the transaction involves the doing of business by the lender and mortgagee in the state of Alabama. Farrior v. Security Co., 88 Ala. 275, 7 South. 200; Mullens v. Mortgage Co., 88 Ala. 280, 7 South. 201." State v. Bank, 108 Ala. 3, 6, 18 South. 533.

And as a further instructive case on the subject:

"The bill alleges that the complainant corporation, 'under its charter and laws of incorporation, had full power and authority' to loan the money and take the mortgage in controversy. In engaging in such a transaction, the complainant was in the exercise of its chief corporate function, as imported by its very name, and as admitted by the bill. The prohibition of the constitution is against 'doing any business in this state' without compliance with the conditions specified. The doing of a single act of business, if it be in the exercise of a corporate function, is as much prohibited as the doing of a hundred such acts; and it is just as much opposed to the policy of the constitution, which is to protect our citizens against the fraud and imposition of insolvent and unreliable corporations, and to place them in an attitude to be reached by legal process from our courts in the event of any existing necessity to bring suit against them to vindicate a legal right, or to contest the validity of any contract made by or with them. The phrase 'doing any business' is more comprehensive in meaning than the carrying on or engaging in business generally, which involves the idea of continuance, or the repetition of like acts. All the adjudged cases, so far as we have examined, in and out of this state, assume this to be true, except the case of Manufacturing Co. v. Ferguson, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137; 2 Mor. Priv. Corp. (2d Ed.) §§ 661, 665, and cases cited. There it was said that a clause in the constitution of Colorado, like the one here under consideration, was not to be construed to prohibit a single act, but only 'the carrying on of business' by a foreign corporation. The act there done was the making of a contract in Colorado, to manufacture certain machinery in Ohio, to be delivered in the latter state for transportation to the purchasers in the former. The promise was a mere agreement to deliver goods in another state, and possibly was not the unlawful exercise of a corporate function. Beard v. Publishing Co., 71 Ala. 60. However that may be, we do not concur in the construction given, in which also two of the judges of the court rendering the decision, it seems, did not agree. Their concurrence in the judgment was placed solely on the ground that the prohibition contained in the Colorado constitution, when directed against a sale of that character, would be an attempted regulation of commerce between the states, and on this account void for repugnancy to the federal constitution. In Dudley v. Collier, 87 Ala. 431, 6 South. 304, we discussed at some length this clause of our constitution, and the act of the legislature seeking to carry it into effect by the imposition of penalties on offending parties. We there distinguished Sherwood v. Alvis, 83 Ala. 115, 3 South. 307, as involving the case of a foreclosed mortgage, by which the contract in question had become, in a measure, fully executed between the parties. This distinction is recognized also in the more recent deliverance of Craddock v. Mortgage Co. (decided at the present term) 7 South. 196, which was determined on the authority of that case. The legislative act cannot change the construction or meaning of the constitutional clause under consideration. It may throw light on its con-

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struction, and render its enforcement more effective; but it can neither add to nor take from the legal significance of its meaning, which was the same before as after the date of the enactment designed to give vigor to its execution. But the statute may be looked to as a legislative interpretation of the constitutional clause, and, as such, is entitled to much weight. Manufacturing Co. v. Ferguson, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137; Ex parte Hardy, 68 Ala. 303. This case, in our judgment, must be governed by the rule declared in Dudley v. Collier, supra. The loan of the money by complainant to the defendant was an act of corporate business, which was prohibited by the constitution; and this illegal act was the consideration of the defendant's promise to pay the borrowed money. The promise, therefore, was void, and, being executory, the courts will not lend their aid to its enforcement; for this would be a subversion of a regulation made for the public good. Apparent injustice, it is true, often follows from the application of provisions of this nature, by which contracts are annulled for illegality, or as obnoxious to good morals, or violative of public policy, or for repugnancy to positive statutes. But the law does not allow this result for the benefit of either of the offending parties as being less censurable or more favored than the other. It only lets the parties who are in equal fault severely alone, as the surest mode of securing obedience to the authority of its mandates." Farrior v. Security Co., 88 Ala. 275, 278, 279, 7 South. 200.

Following the proper rule, as declared in the last-cited case,—i. e. to "let the parties who are in equal fault severely alone,"—the decree of the circuit court is reversed, and the cause is remanded, with instructions to dismiss the bill.

(107 Fed. 781.)

PITTSBURGH, C., C. & ST. L. RY. CO. et al. v. KEOKUK & H. BRIDGE CO.

(Circuit Court of Appeals, Seventh Circuit. April 9, 1901.)

No. 729.

1. EQUITY—BILL FOR REVIEW—NEWLY-DISCOVERED EVIDENCE—LEAVE OF COURT.

   A bill of review for newly-discovered evidence should be brought in the court in which the decrees sought to be reviewed were rendered, leave therefor being first obtained from the supreme court and circuit court of appeals, by which they were affirmed.

2. SAME—FRAUD.

   A bill of review, on the ground of fraud in obtaining the decrees sought to be reviewed, should show how complainants were put on inquiry as to the alleged facts; by what means they learned them; or why the discovery, by the exercise of ordinary prudence, might not have been made when the litigation was begun.

3. BRIDGE COMPANY—SUITS AGAINST RAILROADS FOR TOLLS—DECREES—CONCLUSIVENESS.

   A contract with a bridge company gave railroad companies the right to use the bridge in perpetuity on their agreement to pay certain monthly tolls, and to pay each one-fourth of the deficiency for every period of six months in which the tolls for freight traffic fell below $40,000. The bridge company, however, was not to contract with any other person or company at a less rate than was therein provided for without the consent of the railroad companies. Under this contract suits were brought by the bridge company for deficiencies in tolls, and the decrees therein determined that reduced rates then charged by the bridge company constituted no defense, and that charges then made for counsel fees were also proper. *Held*, that the decrees were not conclusive as to the rights in the same respects, of the same defendants, in a subsequent suit by

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the bridge company on the same contract, for deficiencies covering a distinct period of time, within which the facts determinative of the attitude and rights of the parties may or may not have been the same.

4. SAME—EVIDENCE—DEFENSE.

In a suit on the contract for deficiencies in tolls, defendants claimed a release from liability by reason of complainants' reductions in the stipulated rates. On this question individual officers of defendants testified that they each had no information of the reduction, but the proof showed, on the other hand, that during the long period in question these reductions had been submitted to agents and experts of defendants for examination, and that they were not only reasonable, but necessary to prevent diversion of traffic and income. *Held*, in view of the well-known course of business, and the certainty that changes of rates over one line or system of railroads would soon be felt or known on other lines, and especially in view of the direct interest of defendants in the rates charged, that they must have known thereof, and that their failure to object before suit imported consent, and hence the reductions were no defense.

5. SAME—RELEASE FROM LIABILITY AS SURETY OR GUARANTOR—RIGHT TO ASSERT.

While the purpose of the parties expressed in the contract was to provide a fund for the payment of interest on bonds which it was contemplated should be issued by the bridge company, the railroad companies had a direct interest in the construction and operation of the bridge; and hence, in a suit under the contract for deficiencies in tolls, from liability for which they claimed they had been released by reason of the bridge company's reduction in the stipulated rates, they could not assert the right of a surety or guarantor to insist that any departure from the letter of the contract by the bridge company, however slight, and even though beneficial, had worked their discharge.

6. SAME—CONTRACT WITH RAILROAD COMPANY—CONSTRUCTION—RECOVERY OF EXPENSES OF LITIGATION.

An amendment to the contract further stipulated that the revenues from all sources since the opening of the bridge should be first applied to the payment of interest on the bonded debt, and specified dividends on the capital stock of the bridge company, and the cost of "repairs, maintenance, and all expenses connected therewith, the surplus to belong to the railroad companies parties hereto." *Held*, that the obligations of the railroad companies were not enlarged or modified by the amendment, and hence, in a suit for deficiencies in tolls, they could not be made to pay fees paid by the bridge company to attorneys and one of its officers, and other expenses incurred in the litigation.

7. SAME—EVIDENCE—MONTHLY REPORTS OF RAILROADS.

In a suit for deficiencies in tolls, semiannual statements, made up from the monthly reports of the railroads using the bridge, were competent evidence thereof; their reliability as showing the actual receipts of the bridge company from the railroads affecting their weight only.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

This is a sequel to prior suits between the same parties. By two decrees of the circuit court of the United States for the Northern district of Illinois, the first rendered on January 21, 1884, and affirmed by the supreme court (131 U. S. 371, 9 Sup. Ct. 770, 33 L. Ed. 157), and the second rendered on December 9, 1892, and affirmed by this court under the direction of the supreme court (46 U. S. App. 530, 15 C. C. A. 184, 68 Fed. 19; 155 U. S. 156, 15 Sup. Ct. 42, 39 L. Ed. 106), the appellants were adjudged to pay, and it appears have paid, to the bridge company, for deficiencies in tolls for the use of the bridge under the contract of January 19, 1869, as modified on June 6 and November 25, 1871, the sums of $153,791.29 and $143.367.65, respectively, for the periods from September 1, 1874, to March 1, 1883, and from the latter date until March 1, 1892, in addition to the sum of $36,651.17 paid voluntarily before the first-named date. This suit was brought by the appellants, the

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Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company (called the Pittsburgh Company), and the Pennsylvania Railroad Company, in the circuit court of the United States for the Southern district of Illinois, for the purpose of recovering of the appellee, the bridge company, the money so paid upon the decrees or a part thereof, on the ground of alleged fraud and newly-discovered evidence. The original bill was brought in February, 1895, and, not denying or questioning the right of the bridge company to change the rate of charges or tolls without the consent of the railroad companies, alleged payment of "the sum of $26,000 or thereabouts in excess of the amount which said bridge company was justly, equitably, and legally entitled to have or receive." The amended bill was filed on September 22, 1896. The substance of the averments of fraud is that the bridge company never requested the complainants, or either of them, to consent to any change in the schedule of rates or tolls in the contracts specified, nor notified the Columbus, Chicago & Indiana Central Railway Company (called Columbus Company), or the complainants, or either of them, of any contemplated or desired change of the schedule, or that any such change had at any time become necessary or prudent; that the complainants, at all times heretofore, relying upon the good faith and integrity of the bridge company to charge and collect the tolls and rates specified in the contract and amendments, have understood and believed that the semiannual statements of account rendered showed correctly the items and amounts of receipts by the bridge company for traffic over the bridge, based upon charges or tolls collected in full accordance with the contract and amendments, but that, as they are now informed, believe, and charge, the defendant from time to time fraudulently, and without notice to, and without the consent of, the Columbus Company, and without notice to, and without the consent of, the complainants, or either of them, reduced its rates of charges and tolls, and that the semiannual statements are not based upon the contract rates, but upon much smaller rates, whereby the deficiencies to be made up have been caused, or have been made much larger than if the stipulated rates had been collected; that the statements were also made up upon the false theory that the railway companies, parties to the agreement, had guarantied the receipts of the bridge company from all sources, over and above the cost of operation and maintenance, to equal $40,000 for each six months, whereas, in fact, the guaranty was only that the receipts from freight traffic should equal or net said bridge company the sum of forty thousand dollars semiannually; that in the proceedings in either of the causes in which the decrees against the appellants were entered no question of the basis upon which the semiannual statements had been made was raised or suggested; that the appellants, reposing full confidence in the bridge company, took no thought or action beyond verifying the clerical accuracy of the statements as compared with the books of the company, and, having no thought or information that the contract rates had been modified, were misled and defrauded; that they did not discover the wrong and fraud until recently, and after the second decree was rendered; and that by reasonable diligence they could not have known the new matters and things set forth in time to have used them in said cause "prior to the hearing thereof, and rendition and affirmance of said decree." A demurrer was filed, but by agreement it was withdrawn, and an answer and cross bill filed, the purpose of the latter being to recover of the appellants their share of the deficiencies in tolls accrued since the last decree. The answer, besides denying all allegations of concealment and misrepresentation, and want of notice to the appellants, sets out the pleadings, proceedings, and decrees in the prior suits, for the purpose of showing what was thereby adjudged. Further amendments made to the pleadings of each party need not be stated.

The following provisions of the bridge contract and amendments are pertinent to the present questions:

Original contract of January 19, 1869: "The rates for transportation of freight across said bridge shall be as per Schedule A, hereto attached and made part hereof, and paid for severally by each of the railroad companies transporting the same. The moneys for the use of said bridge shall be paid on the tenth day of each month to the party of the fifth part. In case the party of the fifth part (the bridge company) allows any other railway com-

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pany than those named herein to use said bridge, it shall furnish to the parties of the other parts monthly statements of the freight tonnage transported by said companies, and it is agreed that, if any other railroad company is authorized to transport across said bridge at lower rates than herein stipulated for, such permission shall, of itself, operate to reduce the rates to be paid to the parties hereto so as to correspond with such lower rates."

Schedule A: "The railroad tonnage of all parties over said bridge for each year, from the first day of January to the thirty-first day of December, inclusive, shall be ascertained. * * * Nor shall the aggregate net earnings from freight in any one year fall below the sum of eighty thousand dollars ($80,000) to the said party of the fifth part. And in case the said named sum is not reached at the end of any year under the schedule rate, then the parties of the first, second, third, and fourth parts shall make up to the party of the fifth part such deficiency, each of the said parties, for itself and not for the others, paying said deficiency in proportion to the tonnage it has passed over said bridge, each being responsible only for itself, and not for the others; provided, further, that, during the next or any subsequent year following such deficiency, the rates may be increased at the option of the railway companies hereto; and provided, further, that the party of the fifth part shall not contract with any person or company for the transportation of freight or passengers at a less rate than herein provided for without the consent of the railway companies hereto. No increase of tonnage shall cause a decrease in the aggregate annual revenue from freight. * * * At the end of each year the accounts shall be adjusted, so that the total payments for the year will amount to the sum due, according to the rate above provided for."

Amendment of June 6, 1871: "The following modifications in the original contract between the parties hereto, dated January 19, 1869, for the construction and use of the bridge at Keokuk, are hereby agreed to: First. Instead of the schedule of tolls named therein the following shall be charged: * * * Second. Instead of the railway companies parties to the said contract making good any sum necessary to net the bridge company from railway freight traffic the sum of eighty thousand dollars per annum, pro rata, in proportion to the tonnage passed over the bridge by each railway company, it is agreed that the deficiency, if any, necessary to be paid, in order to produce to the bridge company at the rate of eighty thousand dollars per annum from railway freight traffic, shall be made good by each of the four railway companies hereto, to wit, the Toledo, Wabash and Western, the Toledo, Peoria and Warsaw, the Des Moines Valley, and the Columbus, Chicago and Indiana Central Railway Companies, by each for itself, and not for the others, paying one-fourth part of the deficiency, if any. * * *"

Amendment of November 25, 1871: "And it is further stipulated and agreed by, to, and with the parties hereto, in the manner as hereinafter set forth, that these presents, when executed by the said parties, be and become a part of the modified contract, bearing date the sixth day of June, one thousand eight hundred and seventy-one, and also, in addition thereof, it become a part of the original contract bearing date the nineteenth day of January, one thousand eight hundred and sixty-nine, the foregoing and following being subjoined thereto by the parties hereto as between themselves. And it is further stipulated and agreed that the net revenues from all sources of the said bridge company since the day of its said bridge being opened for traffic, after payment for repairs, maintenance, and all the expenses connected therewith, including reasonable cost for operating the bridge and approaches thereto, shall in the first instance thereafter be applied by said bridge company to the payment of the interest on one million dollars of mortgage bonds issued by said bridge company, and thereafter, provided any advances made by the railroad companies parties hereto towards paying the bonded interest shall have been first repaid as hereinafter recited, said net revenues shall be applied to the payment of dividends upon the capital stock of said bridge company, to wit, one million of capital stock, said dividends not to exceed in any one year eight per centum; and when the revenues as aforesaid are sufficient to make the said payments, to wit, the interest and dividends as aforesaid, the tolls upon the railway passengers and freights shall be from time to time reduced, so that the net revenues from all sources shall never exceed the sum

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necessary to produce the interest and dividends as aforesaid; and any net revenues in excess of said sum shall belong to the railway companies parties hereto, to be divided among them in proportion to the sums they may have, respectively, paid towards the fund necessary to pay the bonded interest. * * * And it is further agreed by the parties hereto that any payments made by the railroad companies hereto, under the provisions of the previous contracts before mentioned, towards making up the sum necessary to meet the bonded interest of the bridge company, the obligation to do which is herewith affirmed, said payments are to be considered as advances, to be repaid out of the first surplus revenues of the bridge company after payment of the bonded interest and expenses as aforesaid, and before any dividends are made upon the capital stock. * * *"

The appellants, the Pittsburgh and Pennsylvania Companies, did not in their own names execute the contract, but they became bound thereby through the signature of the Columbus Company, as explained in the opinions of the supreme court referred to. By the decree in this case the appellants took nothing, but upon the cross bill were adjudged to pay the bridge company the further sum of $142,474.80, for deficiencies accrued to June 19, 1900, the date of the decree. Numerous errors are specified.

J. T. Brooks, George Willard, S. P. Shope, and J. C. Mathis, for appellants.

Henry S. Robbins and Perry Trumbull, for appellee.

Before WOODS, JENKINS, and GROSSCUP, Circuit Judges.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

The bill of the appellants, if intended as a bill for review on the ground of newly-discovered evidence, should have been brought in the court in which the decrees that it was sought to have reviewed were rendered; leave therefor being first obtained of the supreme court and of this court, by which the decrees had been affirmed. Southard v. Russell, 16 How. 547, 570, 14 L. Ed. 1052; Kingsbury v. Buckner, 134 U. S. 650, 671, 10 Sup. Ct. 638, 33 L. Ed. 1047; Bank v. Taylor, 9 U. S. App. 406, 447, 4 C. C. A. 55, 53 Fed. 854; Seymour v. White Co., 34 C. C. A. 240, 92 Fed. 115. As a bill for relief on the ground of fraud in the obtaining of the decrees it is upon its face insufficient, and its defects are in no manner supplemented by the proofs. It is not shown how the appellants were put upon inquiry into the facts, by what means they learned them, nor why the discovery might not just as well have been made at the commencement of the litigation, if, in obedience to the dictates of ordinary prudence, inquiry had been then instituted. No concealment or misrepresentation is alleged. The semiannual statements did not profess or purport to be based on the schedule rates. The bringing of the suits was notice to the appellants to prepare for defense, and "if they took anything for granted it was at their own risk." Embry v. Palmer, 107 U. S. 3, 2 Sup. Ct. 25, 27 L. Ed. 346. Such relief as is sought, though the power to grant it extends to cases of accident and mistake, as was said in Brown v. Buena Vista Co., 95 U. S. 157, 24 L. Ed. 422, "is never given upon any ground of which the complainant, with proper care and diligence, could have availed himself in the proceeding at law." See, also, Avery v. U. S., 12 Wall. 304, 20 L. Ed. 405; Crim v. Handley, 94 U. S. 652, 24 L. Ed. 216. The rule as stated by Chief Justice Marshall in

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Insurance Co. v. Hodgson, 7 Cranch, 332, 336, 3 L. Ed. 362, 363, is "that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself in a court of law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery." The fraud alleged to be available must be extrinsic; that is to say, "not in the subject of the litigation, not in anything which was involved in the issues tried, but fraud practiced upon the party or upon the court, during the trial or in prosecuting the action, or in obtaining the judgment." U. S. v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93; Marshall v. Holmes, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. Ed. 870; Graver v. Faurot, 46 U. S. App. 268, 22 C. C. A. 156, 76 Fed. 257. Of course, one who seeks relief from a decree in equity must be likewise free from fault or negligence.

Touching the decree upon the cross bill, the contentions of the appellants are—First, that by reason of the reduction in the rates and tolls charged during the period covered by the decree they were released from all liability; and, second, that, if liability be conceded, the accounting reported by the master was based upon an erroneous theory, and improperly included charges for counsel fees and other expenses of the bridge company in this suit and in the suit which ended in the decree of December 9, 1892. The appellee insists that these matters were involved in and therefore finally determined between the parties by the decrees rendered in the prior suits. We are unable to see that that is so. Those decrees, of course, determined that the reduced rates theretofore charged were proper, or for some reason constituted no defense to those suits, and that the charges then made for counsel fees were also proper; but it does not follow that any question of the rightfulness of the rates and tolls collected since March 1, 1892, and of the items of account now disputed, is foreclosed. What was done before may have been done with the approval of the railroad companies, while what has been done since the second decree may have been without their knowledge or against their protest. The suits, it is true, have all been between the same parties, and upon causes of action arising out of one and the same contract, and yet each has been upon a separate and distinct cause of action, covering a distinct period of time, within which the facts determinative of the attitude and rights of the parties may or may not have been the same. Cromwell v. Sac Co., 94 U. S. 351, 24 L. Ed. 195; Nesbit v. Riverside Dist., 144 U. S. 610, 12 Sup. Ct. 746, 36 L. Ed. 562; Bissell v. Spring Valley Tp., 124 U. S. 225, 8 Sup. Ct. 495, 31 L. Ed. 411. Of course, whatever was determined in the earlier suits, either expressly or by necessary implication, as that the appellants are in effect parties to and bound by the bridge contract and amendments, and their liability thereon unaffected by the eviction of the Pittsburgh Company from the possession of the railroad of the Columbus Company, must be considered as having been put at rest; but to extend the estoppel as proposed would, we think, be unreasonable and without precedent.

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The contention of the appellants that, by reason of the rates and tolls charged during the period covered by the cross bill having been less than the stipulated rates, they are released from all liability for the deficiencies accruing during that period, seems to be without substantial merit in fact, whatever the proper construction of the contract. The idea of making a defense on that ground is an afterthought, disclosed first in the amended bill, which was not filed until near twenty months after the bringing of the suit, fifteen years after the bringing of the first suit against them by the bridge company, and twenty-two years after they first denied liability upon the contract. The proof is that from July 1, 1885, to February 1, 1889, a discount of 25 per cent. from schedule rates was allowed, and from the latter date to the time of the hearing a rebate of 15 per cent. had been allowed, and these deductions or discounts were shown upon returns submitted to agents and experts of the appellants for examination. In view of the well-known course of business, the certainty that any change of rates over one line or system of railroads will be very soon felt and known upon other lines, and especially in view of the direct interest of the appellants in the rates charged for crossing this bridge, it is impossible to believe that they were without knowledge of the rates charged; and this conclusion is not affected by the testimony of individual officers that they each had no such information. The interchange of business through a course of years necessarily carried to all concerned a knowledge of the rates being charged, and the long-continued failure of the appellants to object to the reduced rates imports consent. The reductions made are shown, without dispute, to have been not only reasonable, but necessary, to prevent the diversion of traffic and income. There is no ground whatever for the charge in the amended bill that the deficiencies were caused or enhanced by the reductions. The contrary is true.

The rules governing contracts of suretyship or guaranty are not applicable. While the purpose of the parties was to provide a fund for the payment of interest upon the bonds which it was contemplated should be issued by the bridge company, the railroad companies which entered into the contract had a direct interest in the construction and operation of the bridge, and cannot assert the right of a surety or guarantor to insist that any departure from the letter of the contract by the bridge company, however slight, and even though beneficial, has worked their discharge. Bank v. Gay, 57 Conn. 224, 17 Atl. 555, 4 L. R. A. 343; Richardson v. Draper, 87 N. Y. 337; Kernochan v. Murray, 111 N. Y. 306, 18 N. E. 868, 2 L. R. A. 183. By its charter—the act of congress under which it was organized—the bridge company was authorized to collect only reasonable tolls, and if the rates originally agreed upon became unreasonable it became its duty to change them, and the duty of the appellants to consent to the change, and, it being clear that the changes made were reasonable and necessary, it ought perhaps on that ground alone to be held that the liability of the appellants was not affected by the reduction; but it is to be observed that the Columbus Company, to whom as the representative

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of the appellants the bridge company was under engagement to give whatever notice was necessary, had gone out of existence, and the appellants had repudiated the contract before the reductions in rates were made; so that notice to the appellants, if required by the contract, and a request for their consent to the changes proposed, would have been useless, and the failure to give the notice and to obtain the consent should therefore be of no consequence.

The objection that the decree should not have included the fees paid to attorneys and an officer of the bridge company, and other expenses incurred in the litigation, is, we think, well taken. The clear effect of the original contract and first amendment was to bind the appellants to make good to the bridge company one-fourth of the deficiency of net income from "railroad freight traffic" for every period of six months, if the amount fell below $40,000. There is nothing in the second amendment to affect this obligation. That amendment has reference to revenues from all sources, and provides that after payment of interest upon the bonded debt and capital stock of the bridge company, and the cost of "repairs, maintenance, and all expenses connected therewith," the surplus "shall belong to the railroad companies parties hereto." The phrase, "all expenses connected therewith," it is clear, includes all expenses which must be taken into account in determining "the net revenues from all sources," and manifestly includes more than can be considered in determining the "net earnings from freight in any one year," or for any period of six months. For deficiencies in receipts from freight traffic only did the railroad companies become responsible. That obligation is expressly affirmed by the second amendment, but it is not enlarged or in any way modified.

It is urged that the semiannual statements, made up from the monthly reports of the railroads using the bridge, were not competent evidence of deficiencies under the contract; but the objection is not sound. There has been no suggestion that the statements do not show the actual receipts of the bridge company from the railroads using the bridge. They were certainly competent for that purpose; and if it be true, as pointed out, that better means might have been employed to obtain true and reliable monthly reports, the fact is irrelevant, unless in the accounting the bridge company should be charged with what it ought to have received in addition to actual receipts; and even upon that theory the fact might affect the weight, but not the competency, of the evidence. The total of the items improperly charged seems to be $36,833.39, one-fourth of which, or $9,208.35, with a proper addition for interest, should be deducted from the decree, and, so reduced, the decree will be affirmed, each party paying one-half the costs of the appeal.

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(107 Fed. 798.)

LOS ANGELES UNIVERSITY et al. v. SWARTH et al.

(Circuit Court of Appeals, Ninth Circuit. March 4, 1901.)

No. 612.

1. DEEDS—CONSTRUCTION—EFFECT OF CONDITIONS.
The consequence of the nonfulfillment of a condition on which real estate is conveyed is a forfeiture of the estate; hence, where the deed provides that there shall be no reversion after a certain time for the failure to perform any conditions therein imposed, after the expiration of such time the estate is freed from such conditions, and the grant becomes absolute.

2. SAME—CONDITION OR COVENANT.
If it is doubtful whether a clause in a deed was intended as a covenant or a condition, a court will incline against the latter construction.

3. SAME.
A deed conveying land to a university corporation recited that the conveyance was made "upon the express conditions and for the consideration hereinafter named, to wit:" First, that the land should be devoted exclusively as a part of the campus of the university, and that no buildings should be erected thereon except those devoted to university purposes; second, that at least one building, to cost not less than a sum named, should be erected within a specified time; third, that in case of the abandonment of the premises for university purposes, or nonuser, or use for other purposes, before a stated time, the title should revert, but that there should be no reversion after the date so designated. *Held*, that the second and third clauses stated conditions from which the land became freed on the expiration of the time named, but that the first, in view of the circumstances and purpose of the conveyance, must be construed as a covenant running with the land, for the breach of which the grantor could recover damages, or which he could enforce performance of in equity in a proper case.

4. COVENANTS—SUIT TO ENJOIN BREACH—PARTIES ENTITLED TO MAINTAIN.
Complainants alleged that they conveyed certain land to defendant corporation upon a covenant that it should be used exclusively as a campus for a university, being induced thereto by representations made by defendant's representatives as to the great benefit which would accrue from the location and maintenance of the university there to the owners of property in the vicinity. They further alleged that defendant or its lessee was proceeding to erect derricks and other structures on the land for the purpose of drilling for oil thereon, and converting it into an oil field, in violation of such covenant, and thereby preventing its use as a campus, and they prayed for an injunction restraining defendant from making such use of the land. *Held*, that in the absence of any allegation that complainants were, at the time of filing their bill, the owners of any property in the vicinity which could be injuriously affected, it did not appear that they retained any interest in the covenant which entitled them to maintain the suit.

5. SAME—BREACH—WHAT CONSTITUTES.
A corporation organized for the purpose of establishing and maintaining an educational institution, and to which land has been conveyed upon a covenant that it shall be used exclusively as a campus for such institution, does not substantially violate such covenant by permitting a lessee to occupy a portion of the land for the purpose of drilling for oil thereon, where it appears that such occupation will probably be but temporary, and will not permanently injure the land for the purpose for which it was granted, and that the school is to be continued, and the revenue derived by the corporation from such use of the land devoted to its maintenance.

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Appeal from the Circuit Court of the United States for the Southern District of California.

This is an appeal from an order granting a preliminary injunction. The suit was brought by the appellees to restrain the appellants from converting and using part of the campus of the Los Angeles University for the purpose of excavating, drilling, and digging into the land for oil, and from erecting, on and over the surface of the land, buildings and derricks, and from converting the campus into an oil field and a place for conducting an oil business, to the injury and damage of the land as a campus for a university or an institution of learning and education. The bill alleges, among other things, that in the year 1886 the complainants and John S. Maltman and G. R. Shatto were the owners of large tracts of land adjoining the city of Los Angeles, situated on the city's western boundary, which said land has since become part of the municipality of Los Angeles by annexation; that during the year 1886 a number of persons, representing and being members of the religious organization known as the "Baptist Denomination in Southern California," devised and projected a plan for the establishment and maintenance of a university for educational purposes, to be located in or near the city of Los Angeles, state of California, to be under the control of the Baptist Denomination; that members, representatives, and agents of the said Baptist Denomination represented to complainants that they were authorized by said denomination to search out the most suitable location that could be secured for a campus, and land that could be obtained by donation to aid in the establishment of said university; that the agents and representatives of said denomination requested and urged complainants to donate their interests in the land described in the bill of complaint for part of a campus for said university, and to this end they set forth the many benefits that would accrue to the owners of lands in the vicinity of such an institution, (in) drives, walks, trees, shrubs, and flowers, and college buildings, residences for professors, and the many sales of lots and lands that would be made to those preferring homes amid refinement and culture, where their children could have the advantages of a Christian education; that in furtherance of said plans, and to assist the establishment of said university, many subscriptions of money and lands were thus solicited and secured from owners of land in the vicinity of said campus; that to this purpose complainants and J. S. Maltman and G. R. Shatto agreed to subscribe, and did subscribe, as a gift for a campus, 15 acres of land, to be used exclusively as a campus for said proposed university; that the agents, representatives, and members of the said Baptist Denomination and others associated themselves in the establishment of said university, and organized for that purpose, under the laws of the state of California, a corporation known as the "Los Angeles University." Complainants allege that they joined in said subscription, and promised to give the interest owned by them in said land for a campus, relying upon the representations made, and believing that the same would be carried out, and that a university that would be a seat of learning under the control and patronage of the organization known as the "Baptist Denomination" would be erected on said land, and that the same would be used exclusively and only as a campus for said university, and for no other purpose, and for all time; that thereafter, on September 16, 1886, in compliance with the promise made and set forth in said subscription, complainants and John S. Maltman made a deed of grant conveying to said Los Angeles University the land described in the bill, comprising 7½ acres, being the south half of said campus; that there was no money consideration given or received for said deed, and no consideration whatever from the grantee for the land other than the promise to establish and maintain a university, and to use the said land exclusively as a campus therefor, and for all time; that one of the conditions of the conveyance, and a covenant set forth in said bill, was the following: "First, that the said land shall be used exclusively as a part of the campus of said university, and no buildings shall be erected thereon except those devoted to university purposes." It is further alleged that, after the execution of said deed, the defendant the Los Angeles University erected, or caused to be erected, one building on the said campus, and the said building has been used almost continuously for educational pur-

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poses and as a dormitory for teachers and pupils, but that there never was established a university, as promised, and according to the terms and conditions of the articles of incorporation of said defendant the Los Angeles University; and there has never been conducted and maintained upon said premises by said defendant, its agents or lessees, more than an academic school for the education of children and students in academic grades and classes, and part of the time only primary schools have been conducted; and for about four years last past a nonsectarian boarding and military school for boys has been conducted by lessees of the said building and campus. It is also alleged that at all times since the conveyance of said land to the grantee, until on or about the 9th day of April, 1900, the whole of said land was used as a campus for such educational institution as was being conducted in the building erected thereupon; that on or about the 9th day of April, 1900, the defendants the College Oil Company and Richard Green, with the consent of, and by reason of and under some agreement, lease, or understanding with, the defendant the Los Angeles University, entered upon the south half of said campus, and that part thereof conveyed to defendants by the complainants and J. S. Maltman, with wagons, lumber, tools, and machinery, built a tool house, erected derricks, set up an engine and boiler and oil tanks, and on the 18th day of April, 1900, began, and at the time of filing the bill were, excavating, drilling, and digging the soil of and into said lands, seeking for petroleum there, to the great and irreparable injury of the land for a university campus or a campus for an educational institution; that the defendants intend to and have contracted and arranged for the drilling and digging of a large number of oil wells, the erection of a pumping plant and many derricks, oil tanks, pipes, tubing, and other apparatus used in the business of producing and selling crude oil, upon said campus, and will convert said campus into an oil field and a place for conducting an oil business, to the great and irreparable injury and damage of said lands as a campus for a university or an institution of learning and education; that the operations of the defendants interrupt the use and enjoyment of said lands for a campus, and that the complainants have never consented, and do not consent, to such use of said lands by defendants. Upon this bill of complaint, duly verified, the complainants moved for an injunction. An order to show cause was issued, and the defendants appeared and filed affidavits in opposition. It appears from these affidavits that the Los Angeles University was incorporated on the 22d day of June, 1886, for the purpose, as declared in the articles of incorporation, of securing and holding by purchase, gift, devise, bequest, or grant, real and personal property, and of selling, mortgaging, leasing, or otherwise disposing of the same, and of erecting buildings and establishing and maintaining a university for educational purposes. It is admitted that the defendants have commenced the operations described in the bill of complaint, but it is averred, among other things, that in the maintenance of the university a debt of about $16,000 has been incurred and is unpaid; that to secure the payment of such indebtedness the trustees of the university mortgaged all of its property, including the lands described in the bill of complaint; that within two years last past extensive explorations immediately adjacent to and on all sides of said lands has made it plain that the said land is underlaid by a valuable and extensive deposit of oil-bearing sand; that the proposed and begun extraction of oil from said land will not and would not irreparably or at all permanently injure said land for use as a college campus, but that it will enable the defendant the better to carry out the purposes of the donor; that observation of the course of oil operations in the vicinity shows that such operations are not likely to continue on the same ground for a long period; that by the extraction of the oil from the oil sands under the land in question it is proposed, and it will be possible, to pay off this indebtedness, and to release all of the property from the mortgage lien, and to procure valuable additional assets for the maintenance of an educational institution upon the premises; that drilling shows that the oil stratum in that region dips slightly to the southward; that experience proves that in oil-bearing strata the crude oil tends to drain towards pumping wells, and especially so if the strata dip in that direction, as in this case, and it is very probable that wells to the southward of the lands in question are continually draining away valuable portions

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of the oil contained in the strata under the lands described in the bill of complaint; that on the west and northwest, and adjacent to said land, wells have been bored, and are being continuously pumped, and that wells are being bored at a distance of about 80 feet eastward from the east line of said lands. It is alleged, upon information and belief, that complainants have no lands or property lying near to or anywhere so situated with reference to the lands described in the bill that they could in any wise be affected by any particular use of said land. A copy of the deed of conveyance mentioned in the bill of complaint is attached to one of the affidavits. From this deed it appears that the grant was made in consideration of the sum of one dollar, lawful money of the United States of America, paid by the party of the second part to the parties of the first part, the receipt whereof was thereby acknowledged, and that they granted, bargained, sold, and conveyed the real property in controversy to the party of the second part. The habendum clause of the deed is as follows: "To have and to hold, all and singular, the said premises, together with the appurtenances, unto the said party of the second part, and to its legal successors, forever." The deed recites that: "This conveyance is made upon the express conditions and for the consideration hereinafter named, to wit: First. That said land shall be devoted exclusively as a part of the campus of said university, and no buildings shall be erected thereon except those devoted to university purposes. Second. That at least one building, costing not less than ten thousand dollars, shall be erected on said campus and completed on or before September 1st, 1887. Third. That in case of abandonment of said premises for such university at any time before January 1st, 1894, or in case of the nonuser thereof, or in case said premises, or any part thereof, is devoted to purposes other than as above specified, then said premises shall immediately revert to the grantors herein, their heirs, executors, administrators, and assigns; the intention being that the reversion herein mentioned shall not occur after January 1st, 1894, under any circumstances." Upon the hearing the court entered an interlocutory order granting the preliminary injunction prayed for in the bill of complaint. From this order the defendants prosecute the present appeal.

Bicknell, Gibson & Trask and T. M. Stewart, for appellants.
John W. Mitchell, for appellees.

Before GILBERT and MORROW, Circuit Judges, and HAWLEY, District Judge.

MORROW, Circuit Judge, after the foregoing statement of facts, delivered the opinion of the court.

It is contended by the appellants: First. That by the third conditional clause of the deed of September 16, 1896, the title of the grantees to the land in question became absolute and free from all limitations and restrictions on January 1, 1894, when the period for reversion therein provided had expired. Second. Assuming that the restriction contained in the first conditional clause of the deed continued as a limitation upon the use of the land, it is contended on the part of the appellants that the complainants cannot enforce the restriction in the absence of a showing that they are the owners or have an interest in land for the benefit of which the restriction was intended by the grantors and provided for in the deed.

The deed recites that the conveyance is made upon the "express conditions" and for the considerations thereinafter named. Then follow the three clauses of the deed containing these "express conditions." These clauses provide: (1) That the land conveyed shall be devoted exclusively as a part of the campus of the university, and that no buildings shall be erected thereon except those devoted

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to university purposes; (2) that at least one building, costing not less than $10,000, shall be erected on said campus on or before September 1, 1887; (3) that the premises described in the deed shall revert to the grantors if abandoned or devoted to purposes other than those specified at any time before January 1, 1894, but under no circumstances is a forfeiture to occur after that date. If these three clauses be construed as conditions, as they are declared to be in the deed, and as their technical terms would seem to indicate, it follows as a legal consequence that the title to the land became absolute in the grantee and free from all limitations and restrictions on January 1, 1894. The consequence of the nonfulfillment of a condition is the forfeiture of the estate. 2 Washb. Real Prop. 3; Woodruff v. Woodruff, 44 N. J. Eq. 349, 353, 16 Atl. 4, 1 L. R. A. 380; Adams v. Valentine (C. C.) 33 Fed. 1; Woodruff v. Power Co., 10 N. J. Eq. 489, 508; Mission v. Appleton, 117 Mass. 326, 329; Langley v. Chapin, 134 Mass. 82. When, therefore, by the terms of the conveyance, the period of forfeiture has passed, the condition has been discharged, and the estate is no longer subject to its limitation or restriction. 1 Washb. Real Prop. (5th Ed.) 96. But may it not have been the intention of the grantors in this conveyance to create a condition in the third clause, where a forfeiture is specifically declared, and a covenant running with the land in the first clause? Conditions are not favored in law, and are construed strictly, because they tend to destroy estates. 4 Kent, Comm. 130; Crane v. Inhabitants of Hyde Park, 135 Mass. 147; McKelway v. Seymour, 29 N. J. Law, 321, 327; Watterson v. Ury, 5 Ohio Cir. Ct. R. 347; In re Wellington, 16 Pick. 87, 99. And if it be doubtful whether a clause in a deed be a covenant or a condition, the court will incline against the latter construction. 4 Kent, Comm. 132; Greene v. O'Connor (R. I.) 25 Atl. 692; Adams v. Valentine, supra. In Post v. Weil, 115 N. Y. 361, 366, 22 N. E. 145, 5 L. R. A. 422, the court of appeals of New York, in considering whether a clause of a deed should be construed as a condition or a covenant, said:

> "Mere words should not be, and have not usually been, deemed sufficient to constitute a condition, and to entail the consequences of forfeiture of an estate, unless from the proof such appears to have been the distinct intention of the grantor and a necessary understanding of the parties to the instrument. Nor should the formal arrangement of the words influence us wholly in determining what the clause was inserted to accomplish; but in this, as in every other case, our judgment should be guided by what was the probable intention, viewing the matter in the light of reason."

Applying this rule to the first clause of the deed under consideration, we find sufficient reason in the evident purpose of the conveyance and in the situation of the parties, as disclosed by the surrounding circumstances, to construe this clause separately, not as a condition, but as a covenant. What, then, is the remedy for the nonfulfillment of a covenant? The delinquent party must respond in damages; but a court of equity can in a proper case enforce the specific performance of a covenant of this character. 3 Pom. Eq. Jur. § 1342; Woodruff v. Woodruff, supra.

This brings us to the consideration of the question whether, in

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proceedings by injunction to enforce the specific performance of a covenant, it is necessary for the complainant to show that he is beneficially interested in the performance of the covenant. The general rule is that the complainant is not entitled to an injunction in any case unless it is shown that he has some vested right or interest that will suffer irreparable injury from the act which he seeks to restrain. Branch Turnpike Co. v. Board of Sup'rs of Yuba Co., 13 Cal. 190; Bank of California v. Fresno Canal & Irrigation Co., 53 Cal. 201, 203; City of New York v. Mapes, 6 Johns. Ch. 46; High, Inj. (3d Ed.) § 9. But there is a distinction to be observed, in enforcing covenants, between a case where the complainant seeks to prevent or abate a nuisance, and a case where the complainant has an interest or title to real estate, in favor of which there is a covenant securing a privilege or right binding in equity. In the latter case it is said that the covenantee has the right to have the actual enjoyment of his property modo et forma, in accordance with the stipulation in that behalf, and that it is no answer to say that the act complained of will inflict no injury upon him. 2 High, Inj. § 1153; 1 Beach, Inj. § 480; Kirkpatrick v. Peshine, 24 N. J. Eq. 216. But in such case it is clear that the complainant must show that he has some interest or title in the land to be protected. This right or interest is the very foundation of his action. He must show that he is the owner of or has an interest in the premises in favor of which the benefit or privilege has been created; otherwise, he has no interest in the covenant and is a mere intruder. In Parker v. Nightingale, 6 Allen, 341, 83 Am. Dec. 632, the suit was brought by the plaintiff in behalf of himself and 11 others, each the owner of a dwelling house and lot on a certain street in Boston, to restrain the defendant Nightingale, another house and lot owner on the same street, from converting his dwelling house into a restaurant. The bill set forth that, before the erection of the said dwelling houses, the land upon and adjoining the street designated belonged to one Hayward; that upon his decease his heirs agreed among themselves that the land should be divided into house lots, and, when conveyed, the grantees should take subject to the condition that no buildings should be erected thereon except for dwelling houses. A lot was conveyed to the defendant upon such condition. Defendant leased the premises to another, who had taken steps to convert the dwelling house into a restaurant. Plaintiffs sought an injunction against such use of the premises. The court, through Bigelow, C. J., said:

"A court of chancery will recognize and enforce agreements concerning the occupation and mode of use of real estate, although they are not expressed with technical accuracy, as exceptions or reservations out of a grant not binding as covenants real running with the land. Nor is it at all material that such stipulations should be binding at law, or that any privity of estate should subsist between parties, in order to render them obligatory, and to warrant equitable relief in case of their infraction. A covenant, though in gross at law, may nevertheless be binding in equity, even to the extent of fastening a servitude or easement on real property, or of securing to the owner of one parcel of land a privilege, or, as it is sometimes called, 'a right to an amenity,' in the use of an adjoining parcel, by which his own estate may be enhanced in value or rendered more agreeable as a place of residence."

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After a further statement of the principles involved, it was held that the plaintiffs were entitled to equitable relief in the enforcement of the restriction contained in the conveyance to the defendant, as owners of the estates for whose benefit the restriction was originally designed; that the purpose of the restriction was to secure to each estate the benefit or advantage which would arise from the specific mode in which the adjoining premises were to be improved and occupied, giving a right or privilege of amenity in each lot within the restriction to the owners of all the other lots within the designated limits. The question arose in this case whether the original grantors were not necessary parties to the proceedings. Upon this question the court said:

"In strictness, perhaps, the right or interest created by the restrictions, being a qualification of the fee, did not pass out of the original grantors, and now remains vested in them or their heirs. But, if so, they hold it only as a dry trust, in which they have no beneficial use or enjoyment, the entire usufruct being in their grantees and their assigns now holding the estates, for whose use and benefit it was intended. Such being the case, then the latter are proper parties to enforce the restriction, and the former, not having any present interest in it, need not be parties to the proceeding."

This is the precise question in the present case, and determines that the complainant, having no present interest in the enforcement of the covenant under consideration, has no right of action against the defendants.

In Sanborn v. Rice, 129 Mass. 387, 396, there was a bill to enforce certain restrictions contained in conveyances by a common grantor. Concerning such a restriction the court said:

"It often happens that owners of land, which they design to put into market in lots for dwelling houses, insert in the deeds of the several lots a uniform set of restrictions as to the purposes for which the land may be used, and as to the portions of it which may be covered by buildings. So far as these restrictions are reasonable in their character, they are upheld and enforced by courts of equity in favor of the original owner, so long as he continues to own any part of the tract for the benefit of which the restrictions were created, as well as in favor of the owner of any one of the lots into which the tract was divided, and against the owner of any of the lots who attempts to set the restrictions at naught."

In Clark v. Martin, 49 Pa. 289, each grantee of adjoining lots had covenanted not to build on the rear portion of his premises above a certain height. The complainant had become the purchaser of a lot adjoining that which the defendant had bought, subject to the condition, and it was held that he was entitled to an injunction against a violation of the covenant on the ground that the condition was imposed for the benefit of such adjoining lot. The court declared it to be plain "that the duty created by the condition and restriction is a duty to the owner of the adjoining lot, whoever he might be." In Watrous v. Allen, 57 Mich. 362, 24 N. W. 104, the grantor conveyed premises with the condition that, if spirituous or intoxicating liquors should be sold or kept for sale on the granted premises, the title to the premises should revert to and vest in the grantor, his heirs and assigns. The condition was treated as a covenant, and enforced by injunction in favor of the assignee of the grantor, on the ground that the restriction was inserted in the deed

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for the benefit of the grantor as the owner of the land and of lots in the vicinity contiguous to the granted premises, and that whatever rights, interests, and benefits the grantor had by virtue of the restriction belonged to the complainant. In Whitney v. Railway Co., 11 Gray, 359, 71 Am. Dec. 715, it was held that plaintiff's right to equitable relief in the enforcement of a restriction as to the use of certain premises was because she was the owner and occupier of a part of the estate for the benefit and advantage of which the restriction was imposed, and therefore had a present right and interest in its enforcement. In Graves v. Deterling, 120 N. Y. 447, 24 N. E. 655, the plaintiffs sought to recover possession of certain property upon the ground that the abandonment of its use as a park worked a forfeiture, and that they, as heirs of the grantor, were entitled to the reversionary title. The court construed the restriction in the deed of conveyance as securing a benefit of the grantors and their heirs by way of forfeiture or reversion, and that, as the whole title to the park and the contiguous lots passed from plaintiffs' ancestor in his lifetime, they inherited no right to either, and, having title to neither the park nor to any land for the benefit of which the park was created, they had no foundation upon which to base an action.

In these and other cases that might be cited, where the complainant has maintained his right to the remedy by injunction, he has shown that he had some interest or estate to protect for the benefit of which the covenant had been created. In the last case cited, the complainants failing to show such an interest, the complaint was dismissed upon the ground that the complainants had no right or interest upon which an action could be founded. And in reason and principle this must be the rule upon the subject. In general terms, the benefit of a condition in a grant is reserved to the grantor and his heirs without regard to the ownership of other property; but, where the grant contains a restriction in the nature of a covenant that has relation to a benefit to adjoining property, the restriction can only be enforced in favor of the title to such adjoining property. In the case at bar it is alleged in the bill that complainants and others were the owners of large tracts of land adjoining the city of Los Angeles, including the land in question; that representatives of the proposed university urged upon the complainants the donation of a tract of land for part of the campus of the university, setting forth the many benefits that would accrue to the owners of land in the vicinity of such an institution, in drives, walks, trees, shrubs, and flowers, college buildings, residences for professors, and in the many sales of lots of land that would be made to those preferring homes amid refinement and culture, where their children could have the advantages of a Christian education; and in furtherance of such plans, and to assist in the establishment of said university, many subscriptions of money and land were thus solicited and received from the owners of land in the vicinity of said campus, and to this purpose complainants and others, relying upon these representations, agreed to subscribe and did subscribe, as a gift, the land in question, to be used exclusively as a campus for said proposed uni-

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versity. But the complainants do not show in their bill, and it is not shown by affidavit or otherwise, that they are now the owners of or have any interest in any lands in the vicinity of the university buildings or the campus connected therewith, but, on the contrary, it is averred upon information and belief, in one of the affidavits, that the complainants have no such interest. The inference is, therefore, that the complainants are not in any way interested in the benefit arising from the restriction or limitation placed upon the granted estate by the terms of the covenant contained in the deed, and that the complainants will not be damaged by the failure of the defendants to comply with the terms of the covenant. They are therefore not in a position to maintain this action. We are of the further opinion that it does not appear that the proposed explorations for oil on the land in question will be a substantial violation of the restriction contained in the covenant under consideration. The educational institution now upon the premises is to be continued, and the proposed operations upon the tract of land now in use as a campus will probably be of a temporary character. The general purpose of the original grant will not be defeated, but may be materially advanced in the pecuniary results to be derived from the development of the wealth supposed to be under the surface of the land. The interlocutory decree will therefore be reversed, and the bill dismissed.

(107 Fed. 819.)

FOURTH NAT. BANK OF ST. LOUIS et al. v. ALBAUGH et al.

(Circuit Court of Appeals, Eighth Circuit. April 3, 1901.)

No. 1,455.

NATIONAL BANK—PERSONALTY OF DECEASED PRESIDENT—CONFLICTING CLAIMS—CONTEST WITH RECEIVER—CROSS-EXAMINATION OF PARTY—EFFECT—RIGHT TO CONTRADICT WITNESS—ADMISSIONS.

In a contest between the receiver of a national bank and creditors of its deceased president as to the right to personalty transferred by the latter to the vice president by three several bills of sale, the creditors claimed the property under two of the bills, as having been executed for their security; and their claim was supported by the vice president, who was made a party to the cause, and claimed to be the president's surety as to the creditors in question. The receiver claimed under the third and earlier bill, which he averred was made in favor of the vice president, as trustee, to secure a large sum owed the bank by the president. To sustain the claim of the creditors, the vice president was called to prove the execution and delivery of the bills on which they relied, and the attending circumstances. *Held* that, the bill on which the receiver relied having been produced and identified on the cross-examination, it was competent for the receiver to inquire concerning its purpose, without making the vice president his own witness in any such sense as to be concluded by his statements, and hence the receiver was not precluded from thereafter showing admissions by the vice president in support of the receiver's claim, though contradicting statements made on the cross-examination. *Held*, further, that the admissions made by the vice president were competent as against the creditors, because they could only claim the fund in right of the vice president, in whose favor two of the bills of sale were executed, on the principle of subrogation.

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Appeal from the Circuit Court of the United States for the District of Kansas.

This is a controversy between Morton Albaugh, receiver of the First National Bank of Emporia, Kan., on the one hand, and the Fourth National Bank of St. Louis, Mo., and the First National Bank of New York and F. Harvey on the other, respecting the ownership of a certain fund now in the possession of said receiver. The controversy arises in this way:

When a receiver was appointed for the First National Bank of Emporia the two banks aforesaid (hereafter referred to as the "St. Louis Bank" and the "New York Bank") held notes amounting to about $40,000 which were either made or indorsed by C. S. Cross and William Martindale. Harvey also held a note for $10,000 which was signed by Cross and indorsed by Martindale. Cross was president of the First National Bank of Emporia, but he committed suicide about the time that the bank was placed in the hands of a receiver. Martindale was vice president of the bank. Cross was the owner of a large amount of unincumbered live stock and personal property on what was known as his "Sunny Slope Farm," near Emporia, Kan. After the death of Cross, and on or about November 16, 1898, Martindale, as is claimed, took possession of the property, doing so, as it is also claimed, under and by virtue of the following bills of sale, which had been executed by Cross in his lifetime:

"For and in consideration of one dollar and other valuable considerations, the receipt of which is hereby acknowledged, I do hereby sell, transfer, and assign to W. Martindale, as trustee, all my personal property of every kind and description, and wheresoever located, except the contents of my house where I am now living, in Emporia, Lyon county, Kansas, and excepting all my policies of life insurance. This sale does not include the notes pledged to my mother for the indebtedness I owe her, amounting to $8,375 and interest, which does not include this $4,500 Davis and Cross note. The property which I transfer to the said Martindale is partially described as follows: All my live stock, cattle, hogs, and horses now on Sunny Slope farm, Lyon county, Kansas, together with all other personal property thereon or on farms adjoining; also all notes, stocks, and bonds and mortgages, excepting, as before stated, those securing my indebtedness to my mother, Sue S. Cross. The said Martindale, as trustee, is first to protect H. C. Whitley and himself upon a certain bond in the Lyon county court. After that, he is to pay himself for any paper upon which he and I are mutually makers or indorsers. The balance, if any, to be paid the First National Bank of Emporia, Kansas, for all matters I owe them. Given under my hand and seal this 15th day of July, 1898. C. S. Cross."

"Emporia, Kansas, Nov. 15, 1898.

"For one dollar and other valuable consideration, the receipt of which is hereby acknowledged, I hereby sell, transfer, and assign unto W. Martindale and his assigns all my right, title, and interest to the following personal property, located in Emporia township, Lyon county, Kansas, and upon what is known as 'Sunny Slope Farm,' and the leased lands thereunto contiguous; all my cattle, horses, and hogs; all feed, implements, hay, grain, etc.; and all other personal property located thereon, whether specifically described hereon or not. Given under my hand and seal the date above written.

"C. S. Cross."

Prior to the execution of the aforesaid instruments, and on March 4, 1898, Cross had executed another bill of sale in favor of Martindale, which was as follows:

"Bill of Sale of Personal Property.

"Know all men by these presents that in consideration of one dollar and other valuable considerations, the receipt of which is hereby acknowledged, I do grant, sell, transfer, and deliver unto W. Martindale, as trustee, his heirs, executors, administrators, and assigns, the following goods and chattels, viz.: All of my personal property, of every kind and description, and wherever located, with the exception of my personal effects, insurance policies, and the contents of my house in Emporia, Lyon county, Kansas, to have and to hold,

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all and singular, the said goods and chattels, forever; and the said grantor hereby covenant with the said grantee that he is the lawful owner of the said goods and chattels, that they are free from all incumbrances, that he ha— good right to sell the same as aforesaid, and that he will warrant and defend the same against the lawful claims and demands of all persons whomsoever. In witness whereof, the said grantor has hereunto set his hand this 4th day of March, A. D. 1898. C. S. Cross."

The receiver claimed, and such was the fact, that Cross in his lifetime had borrowed from the First National Bank of Emporia a large sum of money for his personal use in conducting the cattle business on his Sunny Slope farm, and that the bill of sale of date March 4, 1898, was made for the purpose of securing the repayment of the money which he had thus borrowed. The two banks above mentioned, to wit, the St. Louis Bank and the New York Bank, and F. Harvey, claimed, in substance, that prior to July 18, 1898, an agreement had been entered into between William Martindale and C. S. Cross that the notes held by the three last-named parties should be paid by Cross, because the debts evidenced thereby, as between him and Martindale, were the individual debts of Cross; that, for the purpose of securing to said Martindale the performance of that agreement, the bill of sale of date July 15, 1898, and the bill of sale of November 15, 1898, were executed; and that both of said bills of sale were given in good faith by Cross to Martindale, and by him accepted, with the design on the part of both that they should operate as a chattel mortgage to secure the last-mentioned indebtedness to the two banks aforesaid and to Harvey. Owing to this controversy concerning their respective rights to the fund which might be realized from the sale of the live stock and personal property on what was known as the "Sunny Slope Farm," the parties entered into a stipulation to the effect that the property in controversy should be sold as soon as possible, and that, after the expenses of making the sale and caring for the live stock had been deducted, the net proceeds should be treated as representing the property from which it had been derived, and that the several parties interested in the fund, and claiming the same on the respective grounds heretofore stated, should interpose their respective claims, for adjudication, without being regarded as having waived any of their rights by virtue of the sale of the property. Such claims having been duly preferred by the respective parties in a form which need not be here stated in detail, and the testimony in support of the several claims having been heard and considered, the lower court sustained the contention of the receiver, and awarded the fund, then amounting to $53,396.89, to the receiver, to be disbursed by him according to law. C. S. Jobes was the receiver of the First National Bank of Emporia, who was at first appointed by the comptroller of the currency, and who entered into the aforesaid stipulation. Morton Albaugh, the present receiver, is his successor in office. From the decree in favor of the receiver, last above mentioned, the St. Louis Bank and the New York Bank and F. Harvey have appealed.

Frank Hagerman and T. F. Garver (E. W. Cunningham, on the brief), for appellants.

I. E. Lambert and J. Jay Buck (W. L. Huggins and Samuel S. Spencer, on the brief), for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The trial court appears to have found, in accordance with the contention of Albaugh, the receiver of the First National Bank of Emporia, that the bill of sale dated March 4, 1898, which is quoted above in the statement, was executed by C. S. Cross in favor of William Martindale, who at the time was vice president of the First National Bank of Emporia, as trustee for said bank, to secure the payment of a very large sum of money which Cross then owed to said bank.

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And the principal question which the present record presents is whether there was any legal evidence to sustain such a finding. Three disinterested witnesses testified on the trial that on a certain occasion Martindale, in whose favor all the bills of sale aforesaid were executed, had admitted or stated to them that when Cross executed and delivered to him the first bill of sale, to wit, the one dated March 4, 1898, he said to him, in substance, that he had used a large amount of the money of the First National Bank of Emporia, of which he (Cross) was president; that he expected to use more of its money in running his Sunny Slope farm; and that he executed the bill of sale for the purpose of protecting or securing the bank. It is claimed, however, in behalf of the appellants that these admissions or statements of Martindale were improperly admitted in evidence, that they should have been excluded, and that, if excluded, there is a dearth of evidence to sustain the decree of the lower court. As bearing upon this contention, it is to be observed that when the Fourth National Bank of St. Louis interposed its claim to the fund in controversy, in the form of a bill of complaint, it made the First National Bank of New York, F. Harvey, and William Martindale parties defendant to said complaint, as well as Morton Albaugh, receiver, and F. C. Newman, who was the administrator of C. S. Cross, deceased. The New York Bank answered the complaint of the St. Louis Bank by admitting all the allegations therein contained, and joining with the complainant in its prayer for relief. Martindale, by his answer, also admitted all of the allegations of the complaint, but further averred that the notes held by the St. Louis Bank and the New York Bank represented the individual debts of Cross, he being a mere surety for their payment. Martindale accordingly joined in the prayer for relief which was made by the two banks aforesaid, and asked that the fund now in controversy, which had been realized from the sale of the stock on the Sunny Slope farm, might be appropriated to the payment of the notes held by said banks, because of the execution by Cross of the two bills of sale aforesaid, dated, respectively, July 15, 1898, and November 15, 1898. It will be seen, therefore, that the issue raised by the pleadings was whether, in virtue of the two bills of sale, Martindale was entitled to the fund in controversy for the purpose of paying his own obligations which were held by the two banks and by F. Harvey, or whether the receiver was entitled to the fund by virtue of the earlier bill of sale, dated March 4, 1898. It will also be seen that Martindale, Harvey, and the two banks claimed the fund by the same title, and that as between them there was a complete identity of interest. To sustain the issue on their part, Martindale was accordingly called as a witness, for the purpose of proving the execution and delivery of the two bills of sale upon which they relied, dated July 15, 1898, and November 15, 1898, and the circumstances attending their execution. On his cross-examination the bill of sale of March 4, 1898, was produced and identified, and the delivery thereof at the date of its execution was established. Martindale was then asked what was said by Cross contemporaneously with the delivery of the latter instrument, and in reply to such interrogatory he testified that Cross "said he wanted to use $7,500 [of the bank's money] in the

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Liebfried matter, and he wanted to make a mortgage or bill of sale to cover that amount." He was then asked if he had not previously stated, in the presence of various persons whose names were mentioned, that Cross said to him, in substance, when he delivered the bill of sale of March 4, 1898, that he had been using large sums of the bank's money for the benefit of his Sunny Slope farm, and that he would have to use more money for the same purpose, and that he executed the bill of sale for the purpose of securing the bank for such advances. His reply to this question was that he did not think that he made such a statement to the persons named at the time and place stated in the cross interrogatory, but he did not otherwise deny making such a statement. The various persons referred to were subsequently called as witnesses in behalf of the receiver, each of whom testified that Martindale had made such statements to them. Their testimony was to the effect heretofore stated.

It is urged in behalf of the appellants that the receiver made Martindale his own witness by asking him on his cross-examination what Cross said with respect to the bill of sale of March 4, 1898, when the same was delivered to him; that he was accordingly bound by the statement of Martindale to the effect that it was given to secure the $7,500 used in the Liebfried matter; and that he was not entitled to contradict this statement of Martindale by showing that he had previously given an entirely different account of what was said by Cross when the bill of sale of March 4, 1898, was executed and delivered. We think that this contention on the part of learned counsel for the appellants entirely overlooks the facts to which we have heretofore adverted, namely, that Martindale was himself a party to the action, and that as between himself and the two banks, as well as between himself and F. Harvey, the other claimant, who also held a note of Cross which was indorsed by Martindale, there was a complete identity of interest. It will be observed that the bill of sale dated July 15, 1898, which is the one on which the appellants place their chief reliance, purports to have been made for the protection of Martindale; that is to say, to save him from liability on a certain bond, and "to pay himself for any paper which he and Cross had made and indorsed." Harvey and the two banks had no right to or interest in the property conveyed to Martindale which they or either of them could assert, except such as they could assert through Martindale on the principle of subrogation. If Martindale was entitled, as against the receiver, to appropriate the fund in controversy to the payment of his own obligations which were held by Harvey and the two banks, then, and not otherwise, they were entitled to insist that he should exercise this right for their benefit and advantage as well as for his own. In view of these facts, we are of opinion that it was competent for the receiver to inquire of Martindale on his cross-examination concerning the bill of sale of March 4, 1898; that by so doing the receiver did not make Martindale his own witness in any such sense as to be concluded by his statements; and that it was competent for the receiver to show afterwards, as against all of the parties who claimed adversely to him, the admissions which Martindale (a party to the suit, and the one in whom the adverse right to the fund was vested

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primarily) had made in the presence of several persons, to the effect that the conveyance of March 4, 1898, was made to him, as trustee for the First National Bank of Emporia, to secure whatever indebtedness Cross then owed to the bank, or might afterwards owe to it. We think that whatever objections may have been made to such testimony, even if it be conceded that they were made in such a form as to be reviewed by this court, were properly overruled.

In behalf of the receiver it is contended that the decree below may be sustained upon the ground that the trial judge found that the two bills of sale upon which the appellants rely were never delivered by Cross to Martindale in the lifetime of the former, and that they were therefore ineffective; but, without entering into an investigation or a discussion of the evidence on that point, it is sufficient to say that for the reasons above stated we conclude that there was competent evidence to sustain the finding by the trial court that the bill of sale of March 4, 1898, was made to secure all of the indebtedness of Cross to the First National Bank of Emporia, and that from and after the execution of that instrument all of his personal property, of every kind and description, except his personal effects, insurance policies, and the contents in his house in Emporia, Kan., stood pledged for that purpose. The result is that the decree below was for the right party, and the same should be affirmed. It is so ordered.

(107 Fed. 824.)

UNITED STATES v. PHILIPS, Judge.

(Circuit Court of Appeals, Eighth Circuit. April 6, 1901.)

No. 24.

INTERVENTION—REFUSAL—GRANTING APPEAL AS OF COURSE.

There being two kinds of intervention, one belonging to the class of cases in which leave to intervene is entirely discretionary, and the other to that class in which the right is absolute, and it being sometimes difficult to determine to which a particular intervention belongs, the correct practice for a chancellor, after refusing leave to intervene, is to grant an appeal as a matter of course, if prayed for, as the intervener otherwise would be entirely without remedy if the refusal should be a mistake.

C. H. Nearing, for petitioners.

Gardiner Lathrop, for respondent.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

PER CURIAM. This court has held that there are two kinds of interventions. To the one class belong those cases in which the court or chancellor to whom the application is made is not bound to permit a third party to intervene, and load the case with collateral issues, and in which the allowance of an intervention is entirely discretionary with the chancellor. To the other class of cases belong those in which the right to intervene is absolute, resting, as it does, upon the grounds of necessity, and the inability of the intervener to obtain such relief as he is entitled to by any other means than an intervention. Minot v. Mastin, 37 C. C. A. 234,

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95 Fed. 734, 739; Credits Commutation Co. v. U. S., 34 C. C. A. 12, 91 Fed. 570, 62 U. S. App. 728, 733. When a chancellor denies leave to intervene in a case belonging to the first class, no appeal lies because the action of the chancellor is discretionary, and because the chancellor's action in denying leave to intervene is not a final adjudication upon the intervener's rights. But, when a chancellor denies the right to intervene in a case belonging to the second class, an appeal lies, because the chancellor's action was not discretionary, and because such action was a final adjudication, in that it denied him relief which he could obtain only by an intervention in the pending cause. Now, in view of the fact that there are two species of intervening complaints, and that it may be sometimes difficult to determine to which class the intervention belongs, we think that the correct practice for the chancellor, after refusing leave to intervene, is to grant an appeal as a matter of course, if the intervener prays for an appeal. When the record is removed to the appellate court, it can then be determined by that tribunal whether the action of the lower court was purely discretionary, and its judgment not final, or whether the intervener was entitled to assert his rights by an intervention. Such course of procedure on the part of the chancellor would seem to be necessary, because, if a mistake is made by the lower court as to the character of the intervention, and the chancellor refuses an appeal, the intervener is entirely without a remedy. In view of these considerations, we think that in the present instance the chancellor should have allowed the appeal, and that a motion should have been made in the appellate tribunal to dismiss the appeal. By what is here said we would not be understood as intimating any opinion upon the question whether the intervention sought belongs to the one class or the other. If it belongs to the first class, an appeal will be of no benefit to the intervener, as the appeal will of necessity be dismissed if a motion to that effect is made. The question now before us is simply as to the right of appeal, and as to the correct practice on a state of facts such as is disclosed by the information. We apprehend that there will be no occasion to issue an alternative writ, as we have no doubt that the respondent will allow an appeal in the case when advised of the views of this court.

(107 Fed. 827.)

DODGE v. MISSION TP., SHAWNEE COUNTY, KAN.

(Circuit Court of Appeals, Eighth Circuit. April 11, 1901.)

No. 1,449.

1. LEGISLATIVE POWER TO TAX AND TO AUTHORIZE PUBLIC DEBT LIMITED TO PUBLIC PURPOSE.

   The power of a legislature to levy or to authorize the levy of a tax, and to create or authorize the creation of a public debt to be paid by taxation, is limited to its exercise for a public purpose.

2. DETERMINATION OF NATURE OF PURPOSE OF TAXATION NOT A LEGISLATIVE, BUT A JUDICIAL, FUNCTION.

   The decision of the question whether a tax or a public debt is for a public or private purpose is not a legislative, but a judicial, function. A

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legislature cannot make a private purpose a public purpose, or draw to itself or create the power to authorize a tax or a debt for such a purpose, by its mere flat.

3. PROMOTION OF SUGAR MILLS NOT A PUBLIC PURPOSE.
The promotion of the construction and operation of mills and factories to manufacture sorghum cane into sugar or syrup is a private, and not a public. purpose.

4. BONDS FO : THIS PURPOSE AND THE ACT AUTHORIZING THEM VOID.
Township bonds issued for this purpose, and the act of March 1, 1889, authorizing their issue, are beyond the powers of the legislature and the township, and are void.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Kansas.

This is an action on 359 coupons cut from 22 township bonds issued by the township of Mission, in Shawnee county, in the state of Kansas, under an act of the legislature of that state passed on March 1, 1889, and entitled "An act to encourage the erection of mills and the manufacture of sugar and syrup out of sorghum cane, and authorizing townships and cities of the second and third class to subscribe for stock in sugar factories, and to vote bonds therefor." This act by its terms empowered any township or city named in its title to subscribe to capital stock of any incorporated company organized to erect and operate public mills or factories for the purpose of manufacturing sugar and syrup from sorghum cane upon a favorable vote of its electors, to issue its bonds to pay the subscription, and to levy taxes to pay the principal and interest of the bonds. It required every company and association which received the benefit of any bonds issued under it to retain 10 cents from the purchase price of every ton of sorghum cane which it bought for use in any mill, and to pay this sum over to the treasurer of the proper township, to be applied in payment of the bonds. It declared that all sugar mills which received aid under it were public mills, that they should manufacture sugar or syrup for customers who furnished cane, that they might charge toll therefor, that no factory should be required to receive more cane than it could manufacture into sugar or syrup, and that the amount of toll to be paid should be agreed upon between the company and the persons raising and delivering the cane prior to the time of planting the cane. Each bond contained the following recital: "This bond is one of a series of thirty bonds, of five hundred dollars each, amounting in the aggregate to the sum of fifteen thousand dollars, issued by the township of Mission, of the county of Shawnee, in the state of Kansas, for the purpose of encouraging the erection of a public sugar mill, and the manufacture of sugar and syrup from sorghum cane, in the township of Mission, Shawnee county, Kansas, pursuant to and in accordance with the provisions and requirements of an act of the legislature of the state of Kansas for the year A. D. 1889, the same being an act entitled 'An act to encourage the erection of mills and the manufacture of sugar and syrup out of sorghum cane, and authorizing townships and cities of the second and third class to subscribe for stock in sugar factories, and to vote bonds therefor,' approved March 1, A. D. 1889. And it is hereby certified and recited that all acts, conditions, and things required to be done precedent to and in the issuing of said bonds have been properly done, happened, and performed in regular and due form as required by law." Each coupon contained the statement that it represented "interest on public sugar mill bond No. ———." The plaintiff in error, W. S. Dodge, filed a complaint in this action, in which he made the necessary jurisdictional allegations and then averred that on September 15, 1890, the defendant in error, the township of Mission, issued and delivered 30 bonds, for $500 each, payable on September 15, 1910; that these bonds were registered by the auditor of the state of Kansas; that a copy of one of them was attached to the complaint; that each of the bonds had coupons upon it for the payment of interest; and that he was the owner of 359 of these coupons, which were past due and had not been paid. A demurrer was interposed to this complaint which was sustained by the court

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below, and thereupon a judgment was rendered in favor of the defendant, which is now presented for review by the writ of error.

Henry Keeler and D. R. Hite, for plaintiff in error.

D. M. Valentine, A. A. Godard, and H. E. Valentine, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is a fundamental principle of a republican form of government that no man shall be involuntarily deprived of his life, liberty, or property without due process of law. The prohibition of such a deprivation by the states is found in the fourteenth amendment to the constitution of the United States. But it lies deeper, and limits and conditions every grant of legislative, executive, or judicial authority. The proposition was announced in the early history of the republic, and it has been constantly affirmed. The supreme court said in Calder v. Bull, 3 Dall. 386, 388, 1 L. Ed. 648, 649:

"A law that punishes a citizen for an innocent action, or, in other words, for an act which, when done, was in violation of no existing law; a law that destroys or impairs the lawful private contracts of citizens; a law that makes a man a judge in his own cause; or a law that takes property from A. and gives it to B.,—it is against all reason and justice for a people to intrust a legislature with such powers, and therefore it cannot be presumed that they have done it."

A legislative act which takes, or undertakes to authorize the taking, of private property for a private object, either by taxation, or by the exercise of the power of eminent domain, or by any other means, is not a law, but an arbitrary decree, whereby the property of one citizen may be transferred to another. Such an act is beyond the limits of the powers granted by the people to the legislatures of the states, and is without legal force or effect. The legislative power of taxation and power of eminent domain are alike limited to the exercise thereof for public objects, and they cannot be successfully prostituted for private purposes. For the same reasons the power of a legislature to create or to authorize the creation of a public debt, and the issue of public bonds to be paid by taxation, is subject to the same limitation. The clear and forcible declarations of Chief Justice Black in 1853 in Sharpless v. Mayor, etc., of Philadelphia, 21 Pa. 147, 169, have long since become the settled law of the land. He said:

"Neither has the legislature any constitutional right to create a public debt, or to lay a tax, or to authorize any municipal corporation to do it, in order to raise funds for a mere private purpose. No such authority passed to the assembly by the general grant of legislative power. This would not be legislation. Taxation is a mode of raising revenue for public purposes. When it is prostituted to objects in no way connected with the public interests or welfare, it ceases to be taxation, and becomes plunder. Transferring money from the owners of it into the possession of those who have no title to it, though it be done under the name and form of a tax, is unconstitutional for all the reasons which forbid the legislature to usurp any other power not granted to them."

See, also, Cole v. City of La Grange, 113 U. S. 1, 6, 5 Sup. Ct. 416, 28 L. Ed. 896.

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A necessary corollary to these propositions is that a legislature, which has no power to authorize the levy of a tax or the creation of a public debt for a private purpose, has no power to draw that authority to itself, or to create it by its mere declaration that a private purpose is a public one. Any other theory would destroy the limitation. A legislature cannot make a private purpose a public one by its mere fiat, and the determination of the question in any case whether or not a given object is public or private is a judicial, and is not a legislative, function. Allen v. Inhabitants of Jay, 60 Me. 124, 139, 11 Am. Rep. 185; Tyler v. Beacher, 44 Vt. 648, 651, 8 Am. Rep. 398; In re Eureka Basin Warehouse & Mfg. Co., 96 N. Y. 42, 47, 48.

If the bonds and coupons upon which this action is founded are ever paid, the money to discharge them must be raised by the levying of taxes upon private property situated in the township of Mission. Their validity, therefore, must depend upon the answer to the question whether they were issued for, and their proceeds were applied to, a public or a private purpose. They were issued to raise money to pay a subscription made by the township to the stock of a private corporation organized to erect and operate mills to make sugar and syrup from sorghum cane, and their proceeds were applied to that purpose. The question, then, is whether or not the construction and maintenance of factories owned by private corporations to manufacture sugar and syrup from sorghum cane is a public or a private purpose. The true answer to the question seems to be plain and certain. Speaking generally, a public purpose is a governmental purpose, one of the purposes for which governments are instituted and maintained among men, such as the maintenance of order, the prevention and punishment of crime, the care of highways, the relief of the destitute, the education of youth, the erection of buildings for the use of schools and of the officers of the government; while a private object is one which is ordinarily sought and attained by individuals or private associations of individuals, such as the cultivation of the soil, the manufacture of useful and attractive articles, the purchase and sale of merchandise, and the thousand and one purposes which enlist individual enterprise and energy in a complex and advancing civilization. There seems to be no doubt in which category the promotion of the construction and maintenance of sugar factories falls.

Counsel for the plaintiff in error, however, call attention to the settled rule that the promotion of the construction of railroads and of custom gristmills operated by water is a public purpose, in aid of which municipal corporations may lawfully issue bonds, and to the opinion of the supreme court in Burlington Tp. v. Beasley, 94 U. S. 310, 24 L. Ed. 161, and insist that the aid of the construction of sugar mills is an analogous object, and therefore a public purpose. No argument is required to show that the erection of sugar mills, which directly benefit only those who own them, and which indirectly assist only those who raise sorghum cane, is no such public object as the construction of railroads, our chief means of transportation, whose rates are regulated by law, which may be used by every citizen for a reasonable compensation, and which are of universal benefit. In the

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case of Burlington Tp. v. Beasley, the bonds under consideration were issued to aid in the construction of a custom gristmill propelled by steam, pursuant to an act of the legislature which authorized the township to emit them for the purpose of "building bridges, free or otherwise, or to aid in the construction of railroads or water power, by donation thereto or the taking of stock thereof, or for other works of internal improvement." The bonds did not show on their face for which one of the purposes named in the act they were sent forth, but simply recited that they were issued under this law. The court held in the first place that if there was power in the township to issue the bonds under any circumstances they might be valid, and that as it was clear that such power existed to issue them for the public purpose of building bridges and constructing railroads, and there was nothing on the face of the bonds to vitiate them, they were good in the hands of innocent purchasers, and in the second place that the construction and maintenance of a custom gristmill propelled by steam was a work of internal improvement under this statute of Kansas, for which taxes might be levied to pay these bonds.

The decision in this case is not controlling upon the issues presented in the case at bar, because the bonds before us disclose the fact that they were issued for the purpose of encouraging the construction and operation of a public sugar mill, so that there can be no bona fide purchasers without notice of the object of their issue, and because the Burlington Tp. Case illustrates, not the general rule, but an exception to the well-established rule that the aid of private manufacturing or business enterprises is not a public purpose for which taxation may be imposed. This decision is the outgrowth of a more primitive state of society, when there were no railroads and few good highways, and when custom gristmills in the immediate neighborhoods of productive fields to grind grain for bread for the people and for food for the cattle were a public necessity. In this state of affairs a line of decisions was developed to the effect that aid in the construction and maintenance of custom gristmills driven by water, and the development of the necessary water power to propel them, was a public object, for which taxes might be lawfully levied upon the property of all the citizens. Guernsey v. Burlington Tp., 4 Dill. 375, Fed. Cas. No. 5,855; Harding v. Funk, 8 Kan. 315. The Burlington Tp. Case, perhaps, advanced another step, for the decision was that the promotion of a gristmill propelled by steam, as well as one propelled by water, was a public purpose. This proposition, however, together with the entire line of decisions upon which it rests, forms an exception to the general rule upon this subject, is inapplicable to the public needs and purposes of this day, and ought not to be enlarged. This view is sustained by the decisions of the supreme court, by reason, and by the great weight of authority. The Burlington Tp. Case was decided in 1876. Six years later, in 1882, in the case of Osborne v. Adams Co., 106 U. S. 181, 1 Sup. Ct. 168, 27 L. Ed. 129, the supreme court held, under an act which authorized the issue of bonds "to aid in the construction of any railroad or other work of internal improvement," that a gristmill propelled by steam was not a work of internal improvement, and that bonds

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issued to aid in its construction were void. In 1883 it cited this decision with approval, and held that gristmills propelled by water were works of internal improvement under the same statute, and that bonds issued to aid in the construction of a canal to conduct the water to such mills were issued for a public purpose, and were valid. Blair v. Cuming Co., 111 U. S. 363, 372, 4 Sup. Ct. 449, 28 L. Ed. 457. These decisions show the narrow limits and sharp lines which confine this exception to the general rule.

When we turn from this line of decisions to the consideration of the nature of public aid in the construction and operation of other manufacturing plants of various kinds, the decisions of the supreme court voice no uncertain sound. In Citizens' Savings & Loan Ass'n v. City of Topeka, 20 Wall. 655, 663, 22 L. Ed. 455, the legislature of Kansas had granted to the city council of Topeka the power "to encourage the establishment of manufactories and such other enterprises as may tend to develop and improve such city" and the authority to issue bonds for this purpose. The court held that this grant was beyond the limitations upon the power of the legislature which grew out of the essential nature of all free governments, and that bonds issued by a city to aid and encourage a manufacturing company in establishing and operating bridge shops in Topeka were emitted for a private purpose, and were void. In City of Parkersburg v. Brown, 106 U. S. 487, 491, 1 Sup. Ct. 442, 27 L. Ed. 238, the mayor and city council of Parkersburg had been authorized by the legislature of Virginia to issue the bonds of that city for the purpose of lending them to manufacturers carrying on business in or near the municipality, and the bonds had been issued. But the supreme court held that they were not sent forth for a public purpose, and were invalid. In Cole v. City of La Grange, 113 U. S. 1, 9, 5 Sup. Ct. 416, 28 L. Ed. 896, the legislature of the state of Missouri had granted to the city of La Grange the power to subscribe for stock in any manufacturing company and to issue bonds to pay the subscription. The city had delivered its bonds to a manufacturing company established for the purpose of operating a rolling mill, but the court held that the grant was ultra vires the legislature, that the object was private, and that the bonds were void.

The sugar factory, to aid in the construction of which these bonds were issued, was not to be constructed or operated by the township or its officers, but by private owners. The officers of the township were to have no control or direction of its management. It was not to be erected to perform, or to assist in the performance of, any function of government. All prosperous mercantile and manufacturing enterprises in a town tend to enhance the value of property, to employ labor, and to increase business. The fact that the construction and operation of this mill would have a similar effect in no way differentiates the purpose or object of its promotion from that of the promotion of other private business undertakings. If this attempt to promote the manufacture of sugar by taxation is to be sustained, every holder of property in this township must contribute a portion of that property to pay for the erection and operation of this mill. For what purpose must he make this contribution? Not to

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sustain the government, but to build a mill for private owners, in which they may conduct their own private business. Who receives the proceeds of these bonds? Or, in other words, to whom does the taxpayer really pay his tax? Not to the salaried officers of the government, not to the teachers of the children in the public schools, but to the private individuals who own the mills. For whose benefit does he contribute this share of his property? For the direct benefit of the owners of the mill alone, and perhaps for the indirect benefit of those farmers who contract with these owners before they plant their cane for its manufacture into sugar or syrup. When these facts are studiously considered, all doubt of the character of this promotion vanishes. The aid of the construction and operation of this mill actually serves but two purposes. It serves to enable the owners of the mill to gain the legitimate profits of their undertaking, and it serves to take by taxation from the owners of property in the township a portion of that property and to give it to the owners of the mill or to the promoters of the scheme for their private use. Neither of these objects is a public purpose. Neither of them is a purpose for which taxes can be lawfully levied, or for which municipal bonds may be legally issued. Our conclusion is that the promotion of the construction and operation of a mill for the manufacture of sorghum cane into sugar and syrup is not a public purpose. Township bonds issued for that purpose, and the act of the legislature which authorizes their issue, are alike beyond the powers of the legislature and of the township, and are void. Sharpless v. Mayor, etc., of Philadelphia, 21 Pa. 147, 169; Citizens' Savings & Loan Ass'n v. City of Topeka, 20 Wall. 655, 661; City of Parkersburg v. Brown, 106 U. S. 487, 500, 1 Sup. Ct. 442, 27 L. Ed. 238; Osborne v. Adams Co., 106 U. S. 181, 1 Sup. Ct. 168, 27 L. Ed. 129; Cole v. City of La Grange, 113 U. S. 1, 7, 5 Sup. Ct. 416, 28 L. Ed. 896; Allen v. Inhabitants of Jay, 60 Me. 124, 128, 11 Am. Rep. 185; Mead v. Inhabitants of Acton, 139 Mass. 341, 1 N. E. 413; Michigan Sugar Co. v. Auditor General (Mich.) 83 N. W. 625, 627; U. S. v. Carlisle, 5 App. D. C. 138, 146, 161; Deal v. Mississippi Co., 107 Mo. 464, 468, 18 S. W. 24; Kingman v. City of Brockton, 153 Mass. 255, 26 N. E. 998; People v. Parks, 58 Cal. 624, 643; Attorney General v. City of Eau Claire, 37 Wis. 400; State v. Osawkee Tp., 14 Kan. 418, 420, 19 Am. Rep. 99; City of Geneseo v. Geneseo Natural Gas, Coal, Oil, Salt & Mineral Co., 55 Kan. 358, 361; In re Eureka Basin Warehouse & Mfg. Co., 96 N. Y. 42, 47, 48; Coates v. Campbell, 37 Minn. 498, 499, 35 N. W. 366.

The argument of counsel for the plaintiff in error that the promotion of the construction and operation of this mill is a public purpose, because the legislature declared in the act authorizing the issue of the bonds that the mills aided thereby were public mills, and because the supreme court in Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77, Budd v. People, 143 U. S. 517, 12 Sup. Ct. 468, 36 L. Ed. 247, and Brass v. Stoeser, 153 U. S. 391, 14 Sup. Ct. 857, 38 L. Ed. 757, held that the business of receiving and storing grain for compensation in elevators, warehouses, and docks might be declared by the legislatures of the states to be of a public character, and might be regulated under their police power, has not been overlooked. But that

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contention cannot prevail, because the object of the promotion of this mill and of its operation was clearly private, and a legislature cannot by its mere fiat make a private object a public one for the purpose of taxation, and also because the limits of the power to tax are by no means the same as the limits of the police power of the states. Many private occupations, as the sale of intoxicants, the driving of carriages for hire, and the construction of private buildings along the streets of a city, bear such a relation to the public welfare that they may be regulated under the police power of a state, when there is an entire absence of power in its legislature to tax the property of its citizens to promote or maintain these enterprises. The judgment below is affirmed.

(107 Fed. 834.)

CONNECTICUT MUT. LIFE INS. CO. v. HILLMON.

(Circuit Court of Appeals, Eighth Circuit. April 3, 1901.)

No. 1,451.

1. INSURANCE—CONSTRUCTION OF PLEADING—CONSPIRACY—EVIDENCE—DECLARATIONS OF CONSPIRATORS.

To an action brought by a wife upon a policy of insurance on the life of her husband, which was issued for her sole use and benefit, the insurer pleaded that her husband, one J. H. Brown, and Levi Baldwin and divers other persons to the defendant unknown, unlawfully conspiring and intending to defraud the defendant and two other insurance companies, took out the policy in suit and two policies on the husband's life in other companies, and thereafter, in pursuance of said fraudulent combination, did falsely pretend that plaintiff's husband had been killed, and that a certain dead body produced was his body, whereas plaintiff's husband was not in fact dead, but was concealing himself for the purpose of consummating the alleged conspiracy. *Held*: (1) That the defense so pleaded was in substance that the plaintiff's husband was not dead, and that there could be no recovery on the policy for that reason; (2) that the plea did not charge or allege that the plaintiff ever became a party to the conspiracy, and that unsworn statements of Baldwin, one of the alleged conspirators, which were made prior to the issuance of the policy in suit, were not admissible against the plaintiff in an action by her alone upon the policy; (3) that, under the pleadings, proof of the existence of the alleged conspiracy between the plaintiff's husband, Brown, and Baldwin was only admissible as against the plaintiff for the purpose of strengthening the probability that plaintiff's husband was not dead, but was concealing himself; (4) that the declarations of a conspirator are only admissible against a fellow conspirator when they are made in connection with the doing of some act in execution of, or in furtherance of, the objects of the conspiracy, so as to form a part of the res gestæ, and that within this rule some of the excluded declarations of Baldwin were not admissible against the plaintiff, even if she was a party to the conspiracy, because they were merely narrative of past transactions, and not a part of the res gestæ; (5) that an instruction, asked by the insurer, to the effect that, if the policy in suit was taken out in pursuance of the alleged conspiracy, then the plaintiff could not recover, although her husband was in fact accidentally killed in the manner by her claimed, was properly refused, because no such defense as that outlined in the instruction was pleaded in the defendant's answer.

2. SAME—CONCEALMENT—MOTIVE—EVIDENCE OF CRIME.

In a suit on a policy, where the defense was that the insured was not dead, but hiding, the refusal to permit the defendant to show that the

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insured had committed a crime in another state, for the purpose of disclosing a motive for his concealment, was not a material error.

3. SAME—SWORN STATEMENT—DEPOSITION.

An instruction, in a suit on a policy, that a sworn ex parte statement of a witness, which was in conflict with a deposition of the witness subsequently taken, might be considered, in connection with the deposition, as evidence of the facts recited in such statement, and "with like effect as the deposition," was properly refused, since it was the province of the jury to determine, in the light of the different circumstances under which the statement was made and the deposition was taken, whether they would treat the statement "with like effect" and as entitled to the same credence as the deposition.

4. SAME—CORPSE—IDENTITY—INSTRUCTION.

Where the issue as to whether a body alleged to be that of the insured was in fact the insured's body was fairly submitted to the jury, in a suit on a policy the defense to which was that the insured was not dead, an instruction that there was undisputed evidence that such body had a perfect set of teeth, and, if the jury found that the insured had imperfect teeth, the verdict should be for the defendant, was properly refused, because there was some conflict in the evidence as to the kind of teeth which the deceased had, and because there were many other facts and circumstances which had an immediate bearing upon the issue whether the body produced was that of the insured, and the instruction asked, therefore, singled out one fact bearing on the question of identity, and gave it undue prominence.

5. JURY—PEREMPTORY CHALLENGES—CONSOLIDATED ACTIONS.

Where two actions by the same plaintiff have been consolidated, she was entitled to as many peremptory challenges as if the actions had been tried separately; the same rule also holding good as to the defendants therein, each of which was entitled to three challenges.

Sanborn, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the District of Kansas.

This is an action on a policy of life insurance in the sum of $5,000, which was issued March 4, 1879, on the life of John W. Hillmon, for the sole use and benefit of his wife, Sallie E. Hillmon, the plaintiff below, and the defendant in error here. The case has had an eventful history. John W. Hillmon was killed, as it is claimed, on March 17, 1879, by the accidental discharge of a gun at a camp near Medicine Lodge, in a portion of Kansas which was then sparsely settled. The defendant company alleged fraud, and refused to pay the policy, claiming that Hillmon was still living, and that the body produced as being his was the corpse of another man, who had either been murdered by Hillmon, or was a cadaver that had been found by him somewhere on the plains of Southwestern Kansas. The action was brought on July 13, 1880, and has been tried, as we are advised, six times, before as many different judges and juries, resulting in a mistrial on each occasion except the last and a trial which took place in 1888, on both of which occasions the plaintiff below prevailed. The defense to the action that was relied upon principally on the last trial is set forth in the defendant's answer, after a general denial of all of the allegations of the complaint, in the following language: "(2) Said defendant, further answering, says that on and before the 30th day of November, A. D. 1878, one John W. Hillmon, John H. Brown, and Levi Baldwin, and divers other persons, to the defendant unknown, unlawfully and fraudulently confederating, conspiring, contriving, and intending to cheat and defraud this defendant, procured a large amount of insurance to be taken on the life of the said John W. Hillmon, to wit, in the New York Life Insurance Company * * * the sum of ten thousand dollars, in the Mutual Life Insurance Company of New York * * * the sum of ten thousand dollars, and in the Connecticut Mutual Life Insurance Company, by its policy * * * the sum of five thousand dollars. That thereafter, and in pursuance of said conspiracy, and with said intent, said Hillmon, Brown, and

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Baldwin did falsely and fraudulently pretend and represent unto this defendant and others that said Hillmon was dead, and did, on or about the months of March and April, A. D. 1879, and thereafter, for the purpose of securing the payment of said policies and obtaining the money thereon, falsely and fraudulently claim, pretend, and represent unto this defendant that the said John W. Hillmon was dead, and that a certain dead body which they had procured and had was the dead body of the said John W. Hillmon, whereas said John W. Hillmon was not and is not dead. That since said time the said Hillmon has kept himself concealed, and has and is keeping himself concealed under assumed names, for the purpose of consummating the conspiracy entered into as aforesaid." In addition to the foregoing plea, the answer contained another plea to the effect that the plaintiff had released the cause of action sued upon for a sufficient consideration by a writing which was executed by her on March 4, 1881. To the plea of release the plaintiff replied, in substance, that it was obtained without consideration, by fraud, and the facts constituting the fraud were specifically set forth.

J. E. McKeighan and Edward S. Isham (Buell McKeever, J. W. Green, Shepard Barclay, and M. F. Watts, on the brief), for plaintiff in error.

C. F. Hutchings and L. B. Wheat (John H. Atwood, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

During the progress of the trial, and in its final charge to the jury, the lower court ruled, in substance, that the defendant company had not averred in its answer that Sallie E. Hillmon, the sole beneficiary in the policy, was a party to the alleged conspiracy between John W. Hillmon, John H. Brown, and Levi Baldwin to defraud it and other life insurance companies; that, as her connection with the conspiracy had not been averred, it could not be claimed that she was a party thereto; that the substantive defense which was pleaded in the answer was that Hillmon was not dead, for which reason no liability had accrued on the policy when the suit was filed; that the principal question in the case was whether John W. Hillmon died, as claimed by the plaintiff, in consequence of a gunshot wound inflicted on March 17, 1879; and that the existence of the alleged conspiracy between Hillmon, Brown, and Baldwin was only relevant to strengthen the probability that Hillmon was still living. In various ways exceptions were reserved to these rulings, which will collectively form the first subject for consideration.

It is manifest, we think, from an inspection of the answer, that the trial court was right in holding that the defendant had not pleaded that Mrs. Hillmon was a party to the alleged conspiracy between the three persons last above named, and such seems to have been the view that was entertained at the trial by counsel for the defendant company, for in his opening statement to the jury, after alluding to a remark which had been made by the plaintiff's attorney in his opening address, to the effect that the defendant had never claimed that Mrs. Hillmon was a party to any conspiracy, he said: "What evidence will be deduced on that point is for you gentlemen to determine. What we say on paper is that John W. Hillmon, Levi Baldwin, and

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John H. Brown did conspire to defraud these insurance companies." This was an admission that the defendant had only charged in its answer that the three parties last named had conspired to defraud the company, and that it had not ventured to commit itself to the statement that Mrs. Hillmon had ever participated therein.

It is further manifest that the trial court was right in holding that the fact that John W. Hillmon was not dead when the action was brought, but was concealing himself somewhere, constituted the substantial defense pleaded in that part of the answer which is quoted above; that the issue tendered by the plea was whether he was dead or alive; and that such issue presented the principal question of fact for the consideration of the jury. It will not be presumed that the second plea contained in the answer was intended to state more than one defense, for which reason the first paragraph thereof, which alleges, in effect, that Hillmon, Brown, and Baldwin had entered into a conspiracy to defraud certain insurance companies, among others the defendant, cannot be regarded as stating a substantive defense to the plaintiff's cause of action, but that averment must be treated as being merely introductory to the fact afterwards alleged that Hillmon was not dead. As we construe the plea, this latter allegation constitutes the defense on which the pleader intended to rely. We do not perceive, therefore, that the lower court committed any error in the several rulings last aforesaid, or in making the statement that the existence of the conspiracy between the parties named in the plea was not a controlling issue, but at most was only relevant in so far as its existence, if shown, might tend to strengthen the probability that Hillmon was still living. It was not only not alleged that Mrs. Hillmon ever became a party to the conspiracy, but, as we understand the contention of defendant's counsel, the evidence upon which they now rely to show her possible connection with the conspiracy is the fact that she saw the remains of the man who was shot near Medicine Lodge after they had been exhumed and brought back to Lawrence, Kan., where the plaintiff resided. The argument is that, as she saw the remains of the person who had been shot, not immediately after the occurrence, but at Lawrence, Kan., some weeks after the alleged shooting, she probably discovered that they were not the remains of her husband, and that by suing on the policy after she had made such discovery she attempted to avail herself of the fruits of an existing conspiracy, and by so doing became a party thereto. It is obvious, however, that if she did make the supposed discovery, as counsel assume, and if the jury were satisfied of that fact (as they evidently were not), then, as John W. Hillmon was not dead, her right to recover on the policy was defeated by the very evidence—and the only tangible evidence, as it seems—which is now relied upon to show that she adopted the conspiracy, and became a party thereto, after it was partially executed. The trial court was requested, however, to instruct the jury, in substance, that if the alleged conspiracy between Hillmon, Brown, and Baldwin was entered into, and if Mrs. Hillmon was advised of that fact when the alleged body of Hillmon was brought back to Lawrence and she discovered that it was not the body of her husband, and if she thereafter brought the

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present action, then she adopted the conspiracy; and one complaint which is made by the defendant is that this instruction was not given. For reasons already sufficiently indicated, no error was committed in refusing the request, however correct it may have been as an abstract proposition of law. The crucial question whether the body last above mentioned was the dead body of the plaintiff's husband or that of some other person was submitted to the jury, and the plaintiff's right to recover, so far as the second plea was concerned, was made to turn upon the finding upon that issue. The finding was against the defendant, the jury being satisfied, after listening to the testimony of a multitude of witnesses, that Hillmon was dead, and that the body which was returned to Lawrence was his body. Such being the state of the case, it is obvious, we think, that, as the material issue presented by the request was submitted, the defendant has no cause to complain of the refusal to submit the issue in the proposed form.

It is urged in behalf of the defendant, and an instruction embodying the proposition was refused by the trial judge, that if the policy in suit was taken out in pursuance of the alleged conspiracy between Hillmon, Brown, and Baldwin, and if Hillmon was afterwards accidentally killed in the manner alleged by the plaintiff, while he was engaged in hunting for the corpse of some other person on the plains of Southwestern Kansas, then there could be no recovery. One good and sufficient reason why such an instruction ought not to have been given is that no such defense was pleaded in the answer. We have already expressed the opinion that the defense made by the second plea was, in substance and legal effect, that Hillmon was not dead, and that the plea cannot be construed as containing dual defenses. Manifestly, it ought not to be construed as containing two defenses which are inconsistent, the one denying that Hillmon was killed on March 17, 1879, and averring that he was still alive; and the other admitting that he was accidentally shot, as alleged. It is not necessary to assert that the two defenses were so utterly irreconcilable that they could not have been embodied in the same answer; but it is clear, we think, that if the defendant intended to rely on the defense which it actually pleaded, and also on the one which was outlined in its instruction, they should have been pleaded separately, so as to advise the plaintiff of the precise issues which she would be compelled to meet. A pleading, however skillfully framed, will never be construed by the courts so as to mislead the unwary, but will be interpreted according to its obvious sense and meaning. This action at the time of the last trial had been pending for more than 20 years, and if the long lapse of time, and the fact that Hillmon had not been unearthed, had led the defendant company to suspect that he was in fact killed at the time and place alleged, then it should have amended its answer, if it desired to avail itself of the defense which is suggested by the refused instruction, namely, that the policy was void because it was taken out originally in pursuance of a fraudulent purpose. We cannot regard its second plea as embodying any such defense, or as having been framed by counsel with a view of presenting any such defense when the answer was filed. Aside from this view of the case, we very much doubt, although it is unnecessary to express a definite

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opinion on the point, whether the fact that the policy was solicited in pursuance of the alleged conspiracy, and with intent at some time in the future to make a fraudulent claim thereunder, would constitute a defense to the action brought by Mrs. Hillmon, who was not alleged to have been a party to the conspiracy when the policy was solicited, or to have been in any wise concerned therein. The contract of insurance was founded upon a valuable consideration. It was not an unlawful contract. Mrs. Hillmon had a well-recognized insurable interest in the insured's life, and it is not claimed that the policy was issued in consequence of any false or fraudulent representations. Under the circumstances it is not apparent that a mere intention on the part of John W. Hillmon to make a fraudulent claim thereunder, which was never in fact made, could impair the beneficiary's right of recovery. But, be this as it may, the instruction above referred to was properly refused.

This brings us to a consideration of some of the exceptions to the admission and exclusion of testimony. The defendant company offered to show by four witnesses, namely, Phillips, Blythe, Crew, and Carr, certain statements which had been made to them by Baldwin at various times between the fall of 1878 and the spring of 1879, when the policy in suit was issued. One of these offers was a statement by Baldwin to Crew that he had borrowed money from a certain bank to pay Hillmon's life insurance premium; another was a statement by Baldwin to Carr that "he and Hillmon had a scheme under brogue," and, if it worked out "he [Baldwin] was all right"; another was a conversation between Baldwin and Phillips, in which Baldwin inquired, in substance, either in jest or in earnest, if it would not be a good scheme to get insurance on one's life in a large sum, and go south, and get the body of a greaser, and palm it off as your own body; and another was a request made by Baldwin to Blythe to recommend to him some good insurance companies, as he had a friend who wanted to take out some insurance. These several statements were excluded, and, as we think, properly excluded. Even when there is sufficient evidence in a case to warrant a finding that a conspiracy was entered into by certain of the parties to the action to do some wrongful act, it does not follow that any and every declaration which may have been made by one of the conspirators is admissible even as against his associates in the scheme. Declarations made by one conspirator are not admissible against the others to prove the existence of the conspiracy if such statements are not made in the others' presence. Neither are mere admissions or narrations of what has already taken place admissible, which have no tendency to promote the objects of the conspiracy; the rule being that declarations by individual conspirators, to be admissible against their associates, must be made in furtherance of the common design while it is under way or in process of execution, so as to form properly a part of the res gestæ. State v. Johnson, 40 Kan. 266, 268, 19 Pac. 749; People v. McQuade, 110 N. Y. 284, 307, 18 N. E. 156; People v. Kief, 126 N. Y. 661, 662, 27 N. E. 556; 3 Greenl. Ev. (15th Ed.) § 94, and cases there cited. Tested by this rule, some of the statements mentioned above, particularly those to Crew and Carr, were merely narrative of

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past transactions, and not admissible for that reason. But, for other reasons as well, the testimony was not admissible against Mrs. Hillmon, who was the sole plaintiff. It was not alleged by the defendant company that she ever became a party to the alleged combination to defraud certain insurance companies, either by original participation in the scheme or by subsequently adopting it, and, in the absence of any such averment, we are of opinion that it would have been erroneous to have admitted as against her such casual declarations and inquiries of the man Baldwin as are above described. Under the issues which were presented by the pleadings, we think that the trial court went quite far enough in permitting the existence of the alleged conspiracy between Hillmon, Brown, and Baldwin to be shown for the purpose of strengthening the probability that Hillmon was not in fact dead, but was concealing himself. The existence of the alleged conspiracy was a single isolated fact which the jury might have regarded as having some probative force in solving the real issue in the case as to whether Hillmon was accidentally killed at the time and place alleged in the complaint.

Further complaint is made by the defendant because the trial court refused to permit it to show by certain oral testimony and by reading one section of the Criminal Code of the state of Texas that in the early part of the year 1878 Hillmon had committed an offense against the laws of the state of Texas by removing out of that state certain personal property which he had bought and mortgaged, with an intent to defraud the mortgagee. The admissibility of this evidence is urged upon the ground that, if admitted, it would have disclosed a motive for Hillmon's "disappearance and continued absence." We are of opinion, however, that the evidence was unnecessary for this purpose, as a sufficient motive was disclosed for his disappearance and continued absence; and no further evidence in that behalf was needed, if the defendant's theory of the case was right, that Hillmon was not dead when the suit was brought, but was merely hiding, to enable his wife to collect certain insurance upon his life. The trial court did permit the defendant to show the purchase of the personal property in question, and the reasons given by Hillmon for its purchase, and the fact that it had been removed, and not paid for, and that the property was subsequently sold; this latter testimony being admitted, as we infer, upon the theory that the defendant had the right to trace all of Hillmon's movements, and to exploit his actions for some months before the policy in suit was taken out, for the light it might possibly shed on his subsequent conduct. The introduction of the criminal statute of Texas and the other evidence was unnecessary to establish a motive for Hillmon's disappearance, and the exclusion thereof cannot be regarded as a material error.

A further complaint is made because the trial judge said in his charge with reference to a written statement that had been made by John H. Brown, one of the alleged conspirators, whose deposition had also been taken and read by the plaintiff, that said statement was "not affirmative evidence of the truth of any matter therein contained, and * * * should not be considered * * * except as affecting the credibility of the evidence of said Brown given in his dep-

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osition." The statement of Brown which was thus mentioned and his deposition were entirely irreconcilable as respects the question whether Hillmon was killed on March 17, 1879, or whether the person killed was another man. The direction which the court gave to consider Brown's statement as affecting the credence which should be given to his deposition was, in effect, therefore, a direction to the jury to determine on which occasion Brown had told the truth,—whether when his deposition was taken or when an ex parte statement was obtained from him by a lawyer by the name of Buchan, who seems to have been in the employ of the defendant company, or at least to have been acting in its behalf and in its interest. We are relieved, however, of the necessity of deciding whether there was anything misleading in the excerpt from the charge which has been quoted above, by the fact that no exception was taken thereto, and we may reasonably infer from the fact that no exception was taken that the direction given by the court that Brown's sworn statement to the defendant's attorney was not "affirmative evidence," etc., was not deemed to be of much importance, or as liable to mislead, when the case was submitted to the jury.

In behalf of the defendant company an instruction was asked, which was refused, to the effect that Brown's sworn statement, which was in conflict with his deposition, might "be considered, in connection with the deposition, * * * as evidence of the facts therein stated, * * * with like effect as the deposition of John H. Brown, and may also be considered as affecting the credibility of said Brown." We think that this instruction was faulty, and fully as liable to mislead as the court's charge on the subject, inasmuch as it required the jury to attach as much weight to the one document as to the other, irrespective of the circumstances under which the two documents had been obtained. There was evidence in the case which tended to show that the ex parte statement had been obtained from Brown on September 4, 1879, by much persuasion and by covert threats; and by some unprofessional conduct on the part of the attorney who had obtained it; and that it had been used to induce the plaintiff to release her cause of action upon the policy in suit without consideration. On the other hand, Brown's deposition had been taken at a later date, in the usual way, and he had been cross-examined by the defendant company at great length. In his deposition he admitted having made the statement, and asserted that the statements therein contained to the effect that Hillmon was not dead, and that another man had been killed, were each false. He also explained the reasons and the influences which had been brought to bear upon him to induce him to make the false statement. It was the province of the jury to decide, in view of all the circumstances tending to show how the ex parte statement had been obtained, and the use that had been made of the same, and in view of the fact that it had been introduced into the case by the plaintiff, not as credible testimony, but merely for the purpose of discrediting it, whether they would treat it "with like effect," or consider it as entitled to the same credence as Brown's deposition. If the court had given the defendant's instruction, it might well be said, we think, that it had invaded the province of the jury.

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Complaint is made in behalf of the defendant company because the trial court did not give an instruction to the effect that proof had been offered, which had not been disputed, that the corpse brought back from Medicine Lodge to Lawrence, Kan., had a perfect set of teeth, and that the jury should return a verdict for the defendant if they found from a preponderance of evidence that Hillmon in his lifetime had lost a tooth, or had imperfect teeth. This instruction was in the nature of a commentary on one feature of the evidence, which the court, in our judgment, was not required to make, inasmuch as it appears that there was considerable conflict in the evidence as to the kind of teeth which Hillmon had. Some persons, as it would seem from the testimony, might regard him as having good teeth, and some as having teeth that were imperfect. Besides, this instruction singled out one fact bearing upon the question whether the corpse that was brought back to Lawrence was Hillmon's body, and gave it undue prominence, inasmuch as there were many other facts and circumstances in evidence which had an immediate bearing on the same question, and might be regarded as very persuasive evidence that the body returned was Hillmon's dead body. This issue as to whether it was Hillmon's body, or the body of some other person, was fairly submitted to the jury by the court's charge, and we do not perceive that a reversible error was committed in the refusal of the defendant's instruction.

Another contention on the part of the defendant company is that the trial court erred in permitting the plaintiff to have six peremptory challenges when the jury was impaneled. With reference to this point it is to be observed that at the time of the last trial there were two actions pending in behalf of the plaintiff upon policies of insurance on the life of her husband, one against the present defendant and the other against the Mutual Life Insurance Company of New York, both of which actions involved the same issue as to whether her husband was dead or alive. Originally, there had been three such actions, one against the New York Life Insurance Company, but the latter action had been compromised prior to the last trial. The trial judge ruled that, if the two actions which remained to be tried had not already been consolidated for trial under existing orders, he would order their consolidation, as the issue in each case was the same, and the trial thereof would be exceedingly lengthy. It goes without saying that such order of consolidation was within the discretionary power of the trial judge, and we have no doubt that in the present instance the power was wisely exercised. At all events, it affords no ground for a successful complaint on writ of error. Insurance Co. v. Hillmon, 145 U. S. 285, 293, 12 Sup. Ct. 909, 36 L. Ed. 706. It is urged, however, by learned counsel for the defendant, that, as the two actions were consolidated for trial, the plaintiff was only entitled to three peremptory challenges. It is to be observed that when this case was before the supreme court, and was under consideration in the case last cited (145 U. S. 285, 12 Sup. Ct. 909, 36 L. Ed. 706), that court held that, when actions are consolidated, such an order does not operate to deprive either defendant of the right to challenge as many jurors peremptorily as he would have been entitled to challenge if the cases

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had been tried separately; and the former judgment in favor of the plaintiff was reversed because each defendant to the consolidated cause was not allowed three peremptory challenges. If this rule is applied to the defendants,—that is to say, if consolidated causes are treated separately, so far as the defendants are concerned, for the purpose of preserving to them their respective rights of challenge,—we perceive no reason why the same rule should not be applied to the plaintiff so as to entitle her to the same number of challenges which she would have been entitled to had the cases been tried separately. The learned judge of the trial court acted in accordance with this view, and in so doing we think that he committed no error. It certainly does not appear that the defendant company was prejudiced by permitting the plaintiff to have six peremptory challenges, and the defendants three challenges each, or six in all.

There are some other assignments of error which have been discussed by counsel for the defendant company, all of which have been carefully considered, and found to be without merit. None of them, we think, are entitled to as much consideration as the various assignments already considered. This case has been pending, as heretofore stated, for more than 21 years, and it would be a matter of great regret, and a reproach to our method of administering justice, if, after six laborious and lengthy trials, an error had crept into the record of such consequence as to require a reversal. We are satisfied that no such error was committed, and it is accordingly ordered that the judgment below be affirmed.

SANBORN, Circuit Judge (dissenting). Within six months after the alleged death of Hillmon, John H. Brown, who was with Hillmon when the person, whoever he was, whose body was claimed to be that of Hillmon, was killed, made an affidavit that this body was not Hillmon's; that it was the corpse of another man, whom Hillmon had killed; that Hillmon was still living; and that this cadaver was produced to enable the plaintiff below to collect the $25,000 insurance on Hillmon's life pursuant to a conspiracy which Baldwin, Hillmon, and Brown had formed to accomplish that end. On the trial of this action the plaintiff offered this affidavit in evidence, and it was received without objection. She also offered in evidence Brown's deposition, taken at a later date than the affidavit, in which he testified that Hillmon was dead, and that it was his corpse, and not that of another person, which was produced by him and Baldwin in March, 1879. At the close of the trial, counsel for the defendant requested the court to charge the jury that Brown's affidavit might "be considered, in connection with the deposition of John H. Brown, as evidence of the facts therein stated under oath, against the plaintiff, with like effect as the deposition of John H. Brown; and may also be considered as affecting the credibility of said Brown as a witness." To this request the court responded in its charge in these words: "The oral declarations of said Brown not under oath, and the statement signed and sworn to by him, are not affirmative evidence of the truth of any matter therein contained or mentioned, and they should not be considered by you except as affecting the credibility of the evidence of the said Brown

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in his deposition," and refused to grant the request. The defendant excepted to the refusal, but did not except to the charge. A perusal of this brief statement of the record upon this subject will not, it seems to me, raise a doubt in the mind of any reader that the question presented by the request, that ruled by the charge, and that decided by the refusal to grant the request was the single question whether or not the affidavit of Brown was any evidence of the facts it recited. This, it seems to me, was the only question intended to be raised by the request, was the question which the charge clearly shows that the court understood was presented, and was the only question ruled either by the refusal of the request or by the terms of the charge upon this subject. If this view is correct, the exception to the refusal to grant the request fairly presents the ruling upon this issue. The argument that the question whether or not the affidavit was evidence of the facts it recited was not presented because the request asserted that the affidavit was evidence with like effect as the deposition seems to me to be too technical and critical. The meaning of the words "with like effect" in this request was that the affidavit was evidence of the facts which it recited, subject to the right of the jury to question, believe, or disbelieve its statements in the same way that the deposition was evidence of the facts it related subject to the same right of the jury, and not that the jury must believe the affidavit just as much as they should believe the deposition. The court below had this understanding of the issue which this request presented. It clearly understood that it was an invitation to charge that the affidavit was evidence not only of the lack of credibility of Brown, but also of the facts which it recited, and when it came to rule upon the issue it refused the request, and directly contradicted the declaration that the affidavit was evidence of the facts it related, while it conceded that it might be considered upon the question of the credibility of the witness. The request and the charge seem to me to fairly present one, and only one, question, which was clearly understood and directly ruled by the court both in its charge and in its refusal to grant the request,—the question whether or not the affidavit was evidence of the facts it recited. In the light of the charge, which contradicted the terms of the request, the refusal of the request ruled this question as directly as the charge itself, and for that reason the exception to the refusal fairly challenged the error, and entitled the defendant to a review of the ruling.

When we turn to a consideration of the correctness of the ruling itself, no issue is presented for argument or consideration. Forms and rules are prescribed by statutes and decisions for the taking and production of testimony which give to the opposing party the opportunity and right of cross-examination and the security of an oath. But this opportunity, this right, and this security may be waived by stipulation for, consent to, or silent acquiescence in the introduction of testimony, and when this is done the statement admitted becomes as competent evidence of the facts it details, as though every formality had been complied with. Much more does the offer and introduction of such evidence have this effect, for he who introduces testimony is ordinarily in some sense sponsor for its character. The plaintiff in-

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troduced this affidavit in evidence, and the defendant consented to its admission. The plaintiff was thereby estopped from claiming that it was not evidence of the facts it recited, because the defendant relied, and had the right to rely, upon it for that purpose, and because the plaintiff, having introduced it, was not permitted to take the inconsistent position that it was not competent evidence of the facts it related. Walton v. Railroad Co., 56 Fed. 1006, 1008, 6 C. C. A. 223, 225, 12 U. S. App. 511, 513; National Loan & Investment Co. v. Rockland Co., 94 Fed. 335, 337, 36 C. C. A. 370, 372. The affidavit was persuasive telling evidence upon the crucial questions in the case, upon the identity of the corpse, and upon the conspiracy to defraud the defendant, and yet the company was deprived of its benefit by this ruling of the court. This error is so plain and glaring, and it necessarily deprived the defendant of such important testimony, that, in my opinion, it ought not to be disregarded.

2. Sufficient evidence of a conspiracy between Baldwin, Hillmon, and Brown to obtain the insurance upon the life of Hillmon, and to produce the body of some other person, and collect the insurance, was produced at the trial to induce the court to submit this evidence to the jury upon the question whether or not the body produced by Brown and Baldwin was that of Hillmon. In this state of the case the testimony of Phillips that Baldwin inquired of him about insurance, how long it would take a dead body to decompose, and said that it would be a good scheme to get insurance, and go down south and get the body of a greaser, and collect it; the testimony of Blythe, a lawyer, that Baldwin told him that a friend of his wanted to get insurance, and inquired of him what companies were good; the testimony of Crew that in February or March, 1879, Baldwin said that his indebtedness to the bank had arisen because he had furnished money to pay the premium on Hillmon's insurance, and that he expected to have $10,000 of the insurance money; and the testimony of Carr that about March 10, 1879, Baldwin told him that he and Hillmon had a scheme under "brogue," and that, if it worked out right, he was all right,—were offered in evidence. Several of these conversations were had after the insurance on Hillmon's life had been secured, and before the killing on March 17, 1879. They were had while Baldwin was engaged in carrying on and working out the conspiracy. All this testimony was rejected by the court. In my opinion, this testimony detailed verbal acts and declarations of Baldwin, one of the conspirators, while they were engaged in executing the conspiracy, and upon that ground it was competent evidence essential to the maintenance of the case of the defendant. Drake v. Stewart, 76 Fed. 140, 22 C. C. A. 104, 40 U. S. App. 173; Smith v. Society, 123 N. Y. 85, 25 N. E. 197, 9 L. R. A. 616; Insurance Co. v. Hillmon, 145 U. S. 285, 296, 298, 12 Sup. Ct. 909, 36 L. Ed. 706. The contention that this testimony constituted no evidence against the plaintiff because she was not alleged to be a party to the conspiracy does not seem to me to be sound. There was sufficient evidence of a conspiracy to obtain this policy to defraud the company to warrant the court in submitting this testimony to the jury. If the conspiracy was formed, and the policy was obtained by John W. Hillmon, one of the conspirators, in

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pursuance of a plan that he formed to defraud the company, any assignee or beneficiary of the policy necessarily took it subject to its original defect, and any evidence competent to show that it was originally obtained by fraud must be competent against any one who holds it, for the policy still has that defect in the hands of the assignee or beneficiary. Insurance Co. v. Minch, 53 N. Y. 144; Carpenter v. Insurance Co., 1 Story, 57, Fed. Cas. No. 2,428; Burruss v. Association (Va.) 32 S. E. 49; 1 Bid. Ins. 448, 449. For these reasons, the judgment below should, in my opinion, be reversed, and the case should be remanded to the court below for another trial.

MEMORANDUM DECISIONS.

(108 Fed. 985.)

ANDERSON v. COMPTOIS. (Circuit Court of Appeals, Ninth Circuit. February 21, 1901.) No. 632. Appeal from the District Court of the United States for the Second Division of the District of Alaska. Jackson & Hatch, C. S. Johnson, E. S. Pillsbury, and K. M. Jockson, for appellant. Hubbard, Beeman & Hume, for appellee. T. J. Geary, for receiver Alexander McKenzie. No opinion. Pursuant to stipulation of counsel, judgment of district court reversed, and decree entered upon the merits in favor of appellants.

(108 Fed. 986.)

ATLANTIC, G. & P. CO. v. UNITED STATES. (Circuit Court of Appeals, Ninth Circuit. February 21, 1901.) No. 645. In Error to the District Court of the United States for the Northern District of California. R. Percy Wright, for plaintiff in error. Marshall B. Woodworth, Asst. U. S. Atty. Upon motion of counsel for plaintiff in error, counsel for United States consenting, cause dismissed, without prejudice to any right of plaintiff in error to sue out writ of error to the supreme court of the United States.

(107 Fed. 1003.)

BRADLEY v. TURNER. (Circuit Court of Appeals, Eighth Circuit. April 4, 1901.) No. 1,428. In Error to the Circuit Court of the United States for the District of Minnesota. Action by Charles H. Bradley against A. B. Turner. There was a judgment for defendant, and plaintiff brings error. Affirmed. R. R. Briggs, for plaintiff in error. J. L. Washburn (W. D. Bailey, on the brief), for defendant in error. Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. The complaint in this case alleges in substance that the plaintiff and J. E. Ball, Dan H. Ball, and John McKinley "entered into an agreement for the purpose of purchasing and selling properties valuable for copper or for water power situate in the county of Ontonagon, in the state of Michigan"; that the parties named negotiated with the owners of large tracts of land "with a view to organize a syndicate for the purpose of

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buying said properties and obtain their price with options for said lands"; that the defendant, Turner, agreed to purchase these lands, or such portion of the same as he might desire, at the prices given, or such other prices as might be obtained from the owners of the lands, and would pay the plaintiff and his associates, for their services and for their profit in bringing the lands and the opportunity to purchase them to the attention of the defendant, the sum of $90,000 when the titles to the lands were approved by the legal adviser of the defendant, and the conveyances therefor consummated; that it was subsequently agreed the defendant himself would undertake to complete the titles in consideration of the plaintiff and his associates accepting $65,000 for their services and profit; that the defendant did thereafter form a syndicate and obtain titles for the lands in whole or in part, and that he voluntarily abandoned such part as he did not acquire; that it was agreed between the Balls, McKinley, and the plaintiff that the Balls should receive one-third of the profits of the transaction, McKinley one-third, and the plaintiff one-third, and that the Balls and McKinley have received their shares, but that the plaintiff's share, amounting to $21,666.66, has not been paid, and judgment is asked for the amount. The answer denies the allegations of the complaint and avers "that in the years 1897 and 1898 one John McKinley, mentioned in the complaint, had some negotiation with the defendant looking to the purchase and sale upon certain conditions of certain supposed copper lands in the state of Michigan, including the lands, or some of the lands, described in the complaint, and many other tracts, but some time thereafter the said negotiations were mutually abandoned; the said McKinley, including his associates in interest, if he had any, not only being wholly unable to carry out the terms proposed in said negotiations, but the parties in contemplation as purchasers also having declined further consideration thereof." The John McKinley mentioned in this paragraph of the answer was one of the plaintiff's associates, and represented the plaintiff and his associates in the transaction. At the close of all the testimony in the case the court below directed a verdict for the defendant upon the ground, among others, that the uncontradicted evidence and the plaintiff's own letters showed that the averment of the answer which we have quoted was true, and that all negotiations between the plaintiff and his associates on the one part, and the defendant on the other, were broken off and abandoned by mutual consent by reason of the inability of the plaintiff and his associates to comply with their engagements. To this direction of the court due exception was taken, and the same is here assigned for error. After a most careful and critical reading and consideration of the evidence in the case, the court is unanimously of the opinion that there is an entire failure of proof to support the plaintiff's case, and that the court did not err in directing the verdict for the defendant. No useful purpose would be subserved by setting out the testimony in the case. It raises no question of law, and the science of the law is not advanced by the discussion of mere facts, particularly so when they are of such a character as renders it highly improbable that they will ever arise in another case. It is sufficient to say that it is perfectly clear upon the evidence that the contract set up in the complaint was never consummated, but was abandoned by mutual consent of the parties and by reason of the inability of the plaintiff and his associates to comply therewith on their part, and that whatever of the lands were afterwards acquired by the defendant were acquired by a new and independent contract with other and different parties, with which the plaintiff and his associates had nothing whatever to do. The judgment of the circuit court is affirmed.

(108 Fed. 986.)

CANADIAN PAC. NAV. CO. v. GIBSON. (Circuit Court of Appeals. Ninth Circuit. May 13, 1901.) No. 689. In Error to the District Court of the United States for the District of Alaska. W. E. Crews and R. W. Jennings, for plaintiff in error. Cause dismissed under rule 23 (31 C. C. A. clxiii., 90 Fed. clxiii.) for failure to print record, and under rule 24 (31 C. C. A. clxiv., 90 Fed. clxiv.) for failure to file brief.

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(108 Fed. 986.)

CARSON et al. v. STEELE et al. (Circuit Court of Appeals, Fifth Circuit. May 21, 1901.) No. 1,042. Appeal from the District Court of the United States for the Eastern District of Texas. J. C. Hutcheson and J. C. Hutcheson, Jr., for appellant. F. Charles Hume, for appellee. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. Without adopting all the conclusions of law found by the district judge, we concur in the result reached by him, and the decree appealed from is therefore affirmed.

(107 Fed. 1005.)

CHRISTIE et al. v. GUARANTY TRUST CO. OF NEW YORK et al. (Circuit Court of Appeals, Fifth Circuit. March 19, 1901.) No. 979. Appeal from the Circuit Court of the United States for the Eastern District of Texas. Before PARDEE and SHELBY, Circuit Judges, and TOULMIN, District Judge.

TOULMIN, District Judge. The suit of Guaranty Trust Co. of New York v. Galveston City R. Co., 107 Fed. 311,[1] No. 969 upon the docket of this court, which has just been disposed of by us, sets forth all the facts of the case of which this appeal is a branch. It is not necessary to repeat those facts here, but it is material to the questions presented upon this appeal to make an additional statement. The appellants were interveners in that case in the circuit court, and respectively filed petitions therein propounding claims against the fund in the custody of the court arising from the earnings of the railroad property in the hands of the receiver. The claim of appellant the Central Electric Company was held by the court to be a preferential claim, with an equitable lien superior to that of the mortgage foreclosed in the suit, which ruling was sustained by this court. The claims of appellants George A. Christie and Lovejoy & Sampson were decreed to be preferential liens under and by virtue of the statutes of the state of Texas. The decree of the circuit court on these claims was reversed. No decree was rendered by the circuit court on the claim of the Detroit Electrical Works, and under the rulings of this court it would not be allowed as a preferential claim or claim with a lien of any sort on the earnings of the property in the hands of the receiver. The appellants appeal from the decree of the circuit court allowing the Guaranty Trust Company of New York, trustee and complainant in the foreclosure suit, $5,000 as compensation for itself, and $25,000 as compensation for its solicitors, to be paid out of the earnings of the property in the hands of the receiver, as superior in rank and right to the claims of the appellants. The appellants, excepting the Central Electric Company, are creditors of the railroad company, with claims accruing prior to the receivership, and, having been adjudged to have no lien or preferential claim upon the funds in the custody of the court, they are without interest in the decree from which they have appealed, and their objections thereto should not be considered. The Central Electric Company was adjudged equitably entitled to the payment of its claim out of the surplus earnings of the receivership prior to that of the bondholders; but, inasmuch as its claim is small and it appears that such surplus earnings are largely in excess of the amount necessary to pay such claim, and as the bondholders, who are the only parties substantially interested in the surplus earnings of the property while in the hands of the receiver and in the allowances made out of them to the trustee and its solicitors, do not complain, the objections to such allowances on their merits are not determined or considered by us. Decree affirmed.

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[1] 46 C. C. A. 305.

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(108 Fed. 986.)

DICKERSON v. UNITED STATES. (Circuit Court of Appeals, Fourth Circuit. May 18, 1901.) No. 337. In Error to the District Court of the United States for the Western District of North Carolina. Charles A. Moore and Joseph S. Adams (Tucker & Murphy and Pritchard & Rollins, on the brief), for plaintiff in error. William P. Bynum, Jr., Sp. U. S. Atty. (A. E. Holton, U. S. Atty., and Spencer Blackburn, Asst. U. S. Atty., on the brief). Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

PER CURIAM. Considering the arguments made in this cause upon the various assignments of error presented by the plaintiff in error, defendant below, we are of opinion that a new trial should be granted. The case is remanded to the district court, with instructions to grant a new trial.

(108 Fed. 986.)

THE ENTERPRISE. (Circuit Court of Appeals, Ninth Circuit. 1901.) No. 652. Appeal from the District Court of the United States for the Territory of Hawaii. T. McCants Stewart and H. W. Hutton, for appellants. Appeal dismissed for failure to print record under rule 23 (31 C. C. A. clxiii., 90 Fed. clxiii.).

(108 Fed. 986.)

ERIE R. CO. v. MOORE. (Circuit Court of Appeals, Sixth Circuit. April 13, 1901.) No. 900. In Error to the Circuit Court of the United States for the Northern District of Ohio. John H. Clarke, for plaintiff in error. A. W. Jones and D. F. Anderson, for defendant in error. Before LURTON, DAY, and SEVERENS, Circuit Judges.

PER CURIAM. This was an action for serious personal injuries sustained by the defendant in error while in the line of his duty as a brakeman in the employment of the plaintiff in error. It has been very strenuously urged that there was no sufficient evidence of negligence upon the part of the railroad company to justify the submission of the case to the jury, and that, independently of this, the evidence of contributory negligence by the defendant in error was so conclusive as to require an instruction to find against him upon that ground. We have carefully examined the whole of the evidence, and have reached the conclusion that the learned trial judge did not err in submitting the case to the jury upon both of these questions. No useful purpose can be subserved by setting out the evidence or by presenting our reasons upon the evidence for the conclusion we have reached. The charge, considered as a whole, was one of which the plaintiff in error cannot complain. Judgment affirmed.

(108 Fed. 987.)

GALE v. CHASE NAT. BANK. (Circuit Court of Appeals, Second Circuit. May 11, 1901.) No. 158. In Error to the Circuit Court of the United States for the Southern District of New York. E. B. Whitney, for plaintiff in error. Thomas B. Reed, for defendant in error. Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. The questions presented on this appeal are interesting, and some of them have not been passed upon, at least in concrete form, by the supreme court. The record, however, does not seem to present any important modifications (save only as to the number and particulars of former cashier's drafts not objected to) from that which was before this court

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on the first writ of error. 43 C. C. A. 496, 104 Fed. 214. We therefore deem it unnecessary to add anything to the exhaustive discussion of the questions which will be found in the former opinion. Upon that opinion, and the careful review of the new proofs which will be found in the judge's charge, the judgment of the circuit court is affirmed.

(107 Fed. 1005.)

HIERONYMUS et al. v. NEW YORK NAT. BUILDING & LOAN ASS'N. (Circuit Court of Appeals, Fifth Circuit. April 9, 1901.) No. 955. Appeal from the Circuit Court of the United States for the Southern District of Alabama. G. L. & H. T. Smith, for appellant. R. H. Clark and J. P. Hamilton, for appellee. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. This case is very accurately stated in the opinion of the learned judge of the circuit court, which is reported in 101 Fed. 12. In that opinion it appears that the issues made by the pleadings, the facts admitted or conclusively proved and the law applicable thereto, the laws of the state of New York, and the settled principles of decision illustrated and established by the numerous adjudged cases referred to therein, were all duly considered by the trial judge; and the pointed and clear conclusions reached by him appear to us to be fully sustained. On the final hearing Judge Toulmin announced a further opinion, in these words: "In this case there are 80 grounds of demurrer assigned to the bill as amended. I think, as a whole, they are unnecessarily voluminous and prolix. Some of them, it seems to me, present points not raised by the bill, and many of them are repetitions of the same point. As I understand the amendments to the bill, there are practically but two material questions raised by them: First, the question whether there was a binding contract growing out of the alleged representations as to the time of the maturity of the stock of the defendant company,—whether the time of maturity, alleged to have been fixed at seven years, could be arbitrarily fixed at that period by the company, so as to relieve the complainants, after that period, from the further payment of the charges provided for in the contract; and, second, whether the premium charged was unauthorized by the laws of New York, and the contract, therefore, usurious under those laws. This court held, on the hearing of the demurrers to the bill as originally filed, that the contract was governed by the laws of New York, and that under those laws it was not usurious. I see now no reason to change that ruling. The New York statute governing building and loan associations does not provide for the manner or mode of making loans to members of such associations, or of fixing the premiums to be paid by them, but it does provide that any premiums for loans made to such members shall not be deemed a violation of the provisions of any statute against usury. Andruss v. Association, 36 C. C. A. 336, 94 Fed. 575; Association v. Read, 93 N. Y. 474. If the statute had provided for the manner or mode of fixing the premiums to be paid, and such mode had not been followed, then the premium would have been unlawful. Douglass v. Kavanaugh, 32 C. C. A. 107, 90 Fed. 375. By the terms of the contract providing for the payment of dues, premium, and interest, as the same is shown in the bill, the complainants are not entitled to cancellation of the mortgage after paying such charges for a period of seven years; it not appearing that complainants' shares of stock are fully paid. King v. Union (Ill. Sup.) 48 N. E. 677; Hohenshell v. Association (Mo. Sup.) 41 S. W. 948, 4 Am. & Eng. Dec. Eq. 9; O'Malley v. Association, 92 Hun, 572, 36 N. Y. Supp. 1016; People v. Preston, 140 N. Y. 549, 35 N. E. 979, 24 L. R. A. 57; Weirman v. Union, 67 Ill. App. 550. My opinion is that the demurrers involving the proposition contended for by the complainants, that the contract is a definite and binding contract to satisfy the debt in seven years, are well taken, and they are sustained; also that the demurrers involving the proposition contended for, that the premium is unlawful and usurious, are well taken, and they are sustained. The demurrers presenting the point that the contract is governed by the laws of the state of New York, and that under those laws it is not usurious, are sustained. All

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other demurrers are overruled." The decree appealed from having been rendered by the learned judge in accordance with the views expressed in his opinions above referred to, there appears to us to be no error in the decree, and it is therefore affirmed.

(107 Fed. 1006.)

HOENINGHAUS et al. v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. March 7, 1901.) No. 124. Appeal from the Circuit Court of the United States for the Southern District of New York. W. Wickham Smith, for appellants. Henry C. Platt, Asst. U. S. Atty. Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges. No opinion. Upon the answers received to questions certified to the supreme court (19 Sup. Ct. 305, 43 L. Ed. 576), the decision of the circuit court is affirmed.

(108 Fed. 988.)

LAYDON v. UNITED STATES. (Circuit Court of Appeals. Ninth Circuit. May 13, 1901.) No. 686. In Error to the District Court of the United States for the Northern District of California. P. F. Dunne, for plaintiff in error. Marshall B. Woodworth, U. S. Atty. Cause dismissed under rule 23 (31 C. C. A. clxiii., 90 Fed. clxiii.) for failure to print record, and under rule 24 (31 C. C. A. clxiv., 90 Fed. clxiv.) for failure to file brief.

(108 Fed. 988.)

LINDEBERG et al. v. CHIPPS. (Circuit Court of Appeals, Ninth Circuit. February 21, 1901.) No. 631. Appeal from the District Court of the United States for the Second Division of the District of Alaska. J. C. Campbell, Chas. S. Johnson, K. M. Jockson, and W. H. Metson, for appellants. Hubbard, Beeman & Hume, for appellee. T. J. Geary, for receiver Alexander McKenzie. No opinion. Pursuant to stipulation of counsel, judgment of district court reversed, and decree entered upon the merits in favor of appellants.

(108 Fed. 988.)

LINDEBERG et al. v. REQUA. (Circuit Court of Appeals, Ninth Circuit. February 21, 1901.) No. 648. Appeal from District Court of the United States for the Second Division of the District of Alaska. J. C. Campbell, Chas. S. Johnson, K. M. Jockson, and W. H. Metson, for appellants. Hubbard, Beeman & Hume, for appellee. T. J. Geary, for receiver Alexander McKenzie. No opinion. Pursuant to stipulation of counsel, judgment of district court reversed, and decree entered upon the merits in favor of appellants.

(108 Fed. 988.)

LOUISVILLE & N. R. CO. et al. v. INTERSTATE COMMERCE COMMISSION. (Circuit Court of Appeals, Fifth Circuit. May 14, 1901.) No. 910. Appeal from the Circuit Court of the United States for the Southern District of Alabama. Ed. Baxter, for appellant. L. A. Shaver, for appellee. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. Considering the opinions of the supreme court of the United States in Interstate Commerce Commission v. Clyde S. S. Co., 21 Sup. Ct. 512, 45 L. Ed. ——, and East Tennessee, V. & G. Ry. Co. v. Inter-

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state Commerce Commission, 21 Sup. Ct. 516, 45 L. Ed. —, recently decided, not yet officially reported, this case is remanded to the circuit court, with instructions to set aside its decree adjudging that the order of the commission be enforced (102 Fed. 709), and dismiss the application made for that purpose, with costs; the whole to be without prejudice to the right of the commission to proceed upon the evidence already introduced before it, or upon such further pleadings and evidence as it may allow to be made or introduced, to hear and determine the controversy according to law.

(108 Fed. 988.)

McDONNELL v. JORDAN. (Circuit Court of Appeals, Fifth Circuit. May 7, 1901.) In Error to the Circuit Court of the United States for the Northern District of Alabama. Lawrence Cooper, for plaintiff in error. R. W. Walker, for defendant in error. Before PARDEE and McCORMICK, Circuit Judges.

PER CURIAM. The motion to dismiss this writ because, pursuant to the judgment and mandate of the supreme court of the United States, this cause has been remanded to the probate court of Madison county, state of Alabama, as appears from the certified copy filed in this court of the order and judgment of the lower court, made and entered the 20th day of October, 1900 (see McDonnell v. Jordan, 178 U. S. 229, 20 Sup. Ct. 886, 44 L. Ed. 1048), is granted, at the cost of the plaintiff in error.

(108 Fed. 989.)

MERCANTILE TRUST & DEPOSIT CO. v. COLLINS PARK & B. R. CO. et al. (Circuit Court of Appeals, Fifth Circuit. January 7, 1901.) No. 949. Appeal from the Circuit Court of the United States for the Northern District of Georgia. C. L. Anderson and John L. Tye, for appellant. Alex. C. King, Morris Brandon, and J. A. Anderson, for appellees. Dismissed on stipulation of counsel. See 107 Fed. 762.

(108 Fed. 989.)

MOHR et al. v. JOHNSON. (Circuit Court of Appeals, Fifth Circuit. May 27, 1901.) No. 1,066. Petition for Revision from the District Court of the United States for the Middle District of Alabama. H. H. Hall, for respondent. Docketed and dismissed.

(108 Fed. 989.)

NICHOLS v. McGHEE et al. (Circuit Court of Appeals, Fifth Circuit. May 7, 1901.) Petition for Mandamus to the Circuit Court of the United States for the Northern District of Alabama. Lawrence Cooper, for plaintiff. Milton Humes, J. H. Sheffey, and Paul Speake, for defendants. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The petition for mandamus to the judges of the circuit court for the Northern district of Alabama to disallow and strike out an amendment making new parties to the above-entitled cause is denied.

(108 Fed. 989.)

THE N. & W. NO. 2. (Circuit Court of Appeals, Second Circuit. May 10, 1901.) No. 147. Appeal from the District Court of the United States for

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the Eastern District of New York. This cause comes here upon appeal from a decree of the district court, Eastern district of New York, holding both tug and tow responsible for a stranding on the north side of the main channel into the harbor of New York, and dividing the damages. Wilhelmus Mynderse, for claimant. H. G. Ward, for libelant. Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. The testimony is most conflicting, and the contradictions of fact so sharp that it is absolutely impossible to harmonize them upon any theory. Nearly all the witnesses called by the libelant were examined by deposition. Nearly all those called by the claimant were before the district judge. We have not been able out of this mass of contradictions to satisfy ourselves that his ultimate conclusions should be reversed, although we may not concur in all his findings. The weight of evidence seems to indicate that the tow was not steered with the care and prompt attention to incipient sheers which the situation called for, and that the tug laid her course closer to the northern edge of the channel than she should have done, in view of the existing conditions. Decree affirmed, without interest or costs.

(108 Fed. 990.)

POOLE v. SMITH et al. (Circuit Court of Appeals, Ninth Circuit. February 13, 1901.) No. 622. Appeal from the District Court of the United States for the Northern Division of the District of Washington. Humes & Lysons and John F. Miller, for appellant. Edward Brady, Wilson R. Gay, and Burke, Shepard & McGilvra, for appellees. Appeal dismissed for failure to print record under rule 23 (31 C. C. A. clxiii., 90 Fed. clxiii.).

(107 Fed. 1006.)

RICHTER et al. v. ROBERTS et al. (Circuit Court of Appeals, Fifth Circuit. April 17, 1901.) No. 1,031. Appeal from the District Court of the United States for the Southern District of Florida. G. Bowne Patterson, for appellants. John D. Rouse and Wm. Grant, for appellees. Dismissed on stipulation of counsel.

(108 Fed. 990.)

TEXAS & P. RY. CO. v. WHITE. (Circuit Court of Appeals, Fifth Circuit. April 28, 1901.) No. 1,026. In Error to the Circuit Court of the United States for the Eastern District of Texas. W. T. Armistead and T. J. Freeman, for plaintiff in error. J. F. Jones, for defendant in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. This case was before us at a former term, and is fully stated in the opinion of this court reported in 42 C. C. A. 86, 101 Fed. 928. On the trial that resulted in the judgment to review which this writ of error is brought substantially the same issues were presented by the pleadings, the same proof offered with some additions of cumulative evidence, with the same instructions asked by the plaintiff in error and action of the court thereon; and, the court having carefully conformed its action to the views expressed in the opinion referred to, and we seeing no reason to change our own views as then announced, on the authority of that decision and the conformity of the circuit court thereto, the judgment of that court herein sought to be reviewed is affirmed.

(108 Fed. 990.)

UNITED STATES v. GOODMAN. (Circuit Court of Appeals, Fourth Circuit. May 7, 1901.) No. 393. In Error to the District Court of the

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United States for the Western District of North Carolina. A. E. Holton, U. S. Atty. Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

PER CURIAM. We find no error in the judgment complained of, and the same is affirmed.

(108 Fed. 990.)

WARE v. HART. (Circuit Court of Appeals, Fifth Circuit. May 21, 1901.) No. 1,037. In Error to the Circuit Court of the United States for the Eastern District of Louisiana. D. M. Scholars, for plaintiff in error. T. Jones Cross, for defendant in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. As the evidence offered on the trial of this case before the jury warranted an instruction to find for the defendants, we do not find it necessary to discuss the ruling on exceptions interposed by the city of Baton Rouge, nor the objections to the charge actually given resulting in a verdict in favor of the defendant, and the judgment of the circuit court is affirmed.

(108 Fed. 990.)

WARNER et al. v. CITY OF NEW ORLEANS (JACKSON, Intervener). (Circuit Court of Appeals, Fifth Circuit. May 21, 1901.) No. 1,039. Appeal from the Circuit Court of the United States for the Eastern District of Louisiana. Richard De Gray, John D. Rouse, and Wm. Grant, for appellant. B. K. Miller, for appellee. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. For the reasons orally assigned, the decree appealed from is reversed, and the cause is remanded, with instructions to overrule all exceptions to the master's report on the claim of James Jackson, and enter a decree approving and confirming the same.

(108 Fed. 991.)

WAYNE v. CARTER CRUME CO. (Circuit Court of Appeals, Fifth Circuit. May 21, 1901.) No. 1,038. Appeal from the Circuit Court of the United States for the Northern District of Mississippi. Paul Speake, for appellant. Robert B. Cooke, for appellee. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. As we find no reversible error in the proceedings in the circuit court, and the result is equitable, the decree appealed from is affirmed.

(108 Fed. 991.)

In re WETMORE. Appeal of MARKOE. (Circuit Court of Appeals, Third Circuit. April 29, 1901.) No. 16. Appeal from the District Court of the United States for the Eastern District of Pennsylvania. Before DALLAS and GRAY, Circuit Judges, and BRADFORD, District Judge.

BRADFORD, District Judge. This is an appeal from a judgment of the United States district court for the Eastern district of Pennsylvania, granting a discharge in bankruptcy to William B. Wetmore, a voluntary bankrupt. 99 Fed. 703. His discharge was resisted by Annette B. Markoe, the appellant, on the ground that he had omitted from the schedules attached to his petition and fraudulently concealed a certain supposed interest under the fourth item of the will of his father, Samuel Wetmore.

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This court having this day, on the petition of G. Plantou Middleton, trustee of Wetmore's estate in bankruptcy, for revision of a certain order made in the proceedings in the court below, decided that the bankrupt was not at the time of the filing of the petition in bankruptcy entitled under that clause to any right, interest, or property which could pass to the trustee by virtue of section 70 of the bankruptcy act, it necessarily follows that this appeal must be dismissed, with costs, and it is accordingly so ordered.

(108 Fed. 991.)

WIMBERLEY v. FRANCESCO DI SIMONE. (Circuit Court of Appeals, Fifth Circuit. May 29, 1901.) No. 1,049. W. W. Howe, for appellant. Wm. Armstrong, for appellee. No opinion. Error confessed, and cause reversed and remanded.

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§ 1. **Appeal.**
A finding of fact by a court of admiralty upon conflicting evidence will not be reversed or modified by an appellate court unless there is a clear preponderance of evidence against it.
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§ 1. Decisions reviewable.

The question whether or not the trial court has the jurisdiction to make an order granting or refusing a new trial is reviewable in the federal courts by an appeal or writ of error challenging such order.

—City of Manning v. German Ins. Co., 107 Fed. 52..46 C. C. A. 144

An order made by a court requiring a city to pay a sum to a receiver on account of a disputed claim against the city, which makes no provision for the return of the money in any case, is appealable as a final decree, although it leaves the question of the city's ultimate liability for future determination.

—City of Eau Claire v. Payson, 107 Fed. 552.....46 C. C. A. 466

There being two kinds of intervention, one belonging to the class of cases in which leave to intervene is entirely discretionary, and the other to that class in which the right is absolute, and it being sometimes difficult to determine to which a particular intervention belongs, the correct practice for a chancellor, after refusing leave to intervene, is to grant an appeal as a matter of course, if prayed for, as the intervener otherwise would be entirely without remedy if the refusal should be a mistake.

—United States v. Philips, 107 Fed. 824.....46 C. C. A. 660

§ 2. Presentation and reservation in lower court of grounds of review.

An objection to an instruction that it was not sufficiently full cannot be sustained on appeal if the attention of the court below was not called thereto by a request for further instruction.

—Cass County v. Gibson, 107 Fed. 363.....46 C. C. A. 341

A general exception to a court's refusal to give requested instructions presents no question for review.

—Cass County v. Gibson, 107 Fed. 363.....46 C. C. A. 341

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A general exception to an instruction, which does not suggest or point out the defect complained of, so as to bring it distinctly to the court's attention, and afford an opportunity to remedy an omission complained of, if any exists, presents no question for review.
—Cass County v. Gibson, 107 Fed. 363.....46 C. C. A. 341

If, in trespass to try title, there is anything in the evidence regarding lot lines or fences or other matters tending to render the verdict vague or uncertain, it cannot be inquired into on an appeal raising a question as to its sufficiency in such respects; that being a matter to be dealt with by the trial court on a motion for a new trial.
—Cochran v. Schreiber, 107 Fed. 371.....46 C. C. A. 349

Where special instructions were offered, refused, and the refusal excepted to en bloc, no error can be predicated thereon if some of them were unquestionably bad.
—St. Louis Brewing Ass'n v. Hayes, 107 Fed. 395....46 C. C. A. 370

§ 3. Parties.
Where the judgment or decree is joint, all the parties against whom it is rendered must join in the writ of error or appeal, unless there be summons and severance, or the equivalent.
—Loveless v. Ransom, 107 Fed. 626.....46 C. C. A. 515

This matter is jurisdictional, and objection may be made at any time before final disposition of the appeal.
—Loveless v. Ransom, 107 Fed. 626.....46 C. C. A. 515

§ 4. Requisites and proceedings for transfer of cause.
Allowance of appeal need not be by a formal order, but may be by approval of appeal bond.
—In re Fiechtl, 107 Fed. 618; Peter Hand Brewery Co. v. Security Title & Trust Co., Id.....46 C. C. A. 497

Citation is not necessary where appeal is taken during the term at which the order appealed from was entered.
—In re Fiechtl, 107 Fed. 618; Peter Hand Brewery Co. v. Security Title & Trust Co., Id.....46 C. C. A. 497

§ 5. Record and proceedings not in record.
The exclusion of testimony will not be reviewed on appeal unless the record shows the nature of the objection interposed thereto.
—Massenberg v. Denison, 107 Fed. 18.....46 C. C. A. 120

Where a bill of exceptions on appeal to the United States circuit court of appeals was presented to the trial judge for allowance and signature within the time as extended, but it was not signed, or its execution perfected, within the time, the only question that can be considered on an appeal is whether the complaint warranted the judgment rendered in favor of plaintiff.
—Reynolds v. Lilly, 107 Fed. 381.....46 C. C. A. 359

§ 6. Assignment of errors.
To compel consideration of an assignment of error as to the admission or rejection of testimony, it should quote the full substance of the evidence admitted or rejected, as required by the rules of court relating to such assignments.
—Cass County v. Gibson, 107 Fed. 363.....46 C. C. A. 341

To compel consideration of an assignment of error as to the refusal of instructions, it should set them out totidem verbis, as the rules of court require.
—Cass County v. Gibson, 107 Fed. 363.....46 C. C. A. 341

An assignment of error to the giving of an instruction containing a number of propositions cannot be considered where the particular proposition of law objected to, or the grounds of objection, are not pointed out.
—Hutchinson Cooperage Co. v. Snider, 107 Fed. 633..46 C. C. A. 517

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§ 7. **Review.**
Neither the evidence nor the charge of the court on an issue as to the citizenship of plaintiff in error being before the court, as no bill of exceptions was taken, it will be assumed that the jury properly found the issue against him.
—Terry v. Davy, 107 Fed. 50.....46 C. C. A. 141

An order granting or refusing a new trial, which the court has the jurisdiction to make, is discretionary with the trial court, and cannot be reviewed by appeal or writ of error in the federal courts.
—City of Manning v. German Ins. Co., 107 Fed. 52..46 C. C. A. 144

Where on writ of error the court determines the question of the power reserved by a benevolent association to change its by-laws, and remands the case on second trial, the ruling became for the court and on appeal the law of the case.
—Supreme Lodge Knights of Pythias v. Lloyd, 107 Fed. 70.....
46 C. C. A. 153

A complainant who amends his bill after a demurrer has been sustained thereto cannot have the decree sustaining such demurrer reviewed on appeal from a subsequent decree rendered on the amended bill.
—Frishmuth v. Farmers' Loan & Trust Co., 107 Fed. 169; Antelo v. Same, Id.....46 C. C. A. 222

The decision of a question on a former appeal is the law of the case on a subsequent appeal in the same case.
—City of Austin v. Bartholomew, 107 Fed. 349; Nalle v. City of Austin, Id.....46 C. C. A. 327

Judgment will not be reversed for error in instructing a finding for defendants, where the evidence established a prima facie case for plaintiff, it being conceded that evidence sufficient to rebut the same was at the command of defendants, to be offered if required.
—United States v. Norton, 107 Fed. 412.....46 C. C. A. 387

In an action for damages for a collision between a schooner and a tug and tow, where the testimony of the witnesses from the tug and schooner are most conflicting, and the opinion of the trial judge shows that the credibility of the witnesses was doubtful, his decision, based on the evidence of disinterested witnesses, will not be disturbed.
—The George L. Garlick, 107 Fed. 542; In re Moran, Id.....
46 C. C. A. 456

Where there was conflicting evidence before the commissioner in proceedings to limit liability after collision, his decision as to the value of the vessel will not be disturbed.
—The George L. Garlick, 107 Fed. 542; In re Moran, Id.....
46 C. C. A. 456

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Of merchandise subject to duty, see "Customs Duties," § 2.

ASSESSMENT.

Against shareholders in national banks, see "Banks and Banking," § 1.
Of loss on insured, see "Insurance," § 4.

ASSIGNMENT OF ERRORS.

See "Appeal and Error," § 6.

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ASSIGNMENTS.

Fraud as to creditors, see "Fraudulent Conveyances."
In bankruptcy, see "Bankruptcy," § 1.
Residence of assignee for purpose of federal jurisdiction, see "Courts," § 1.

§ 1. Actions.

A right of action against a city to recover rentals alleged to be due it under a contract with a water company is at law, and the fact that the company has made an equitable assignment of the contract by way of mortgage does not give the assignee the right to sue thereon in equity, merely because his own interest is equitable, and he cannot, by joining the city as defendant, have its rights determined in a suit to foreclose the mortgage. The city is entitled to have its rights and obligations under such contract determined by a trial in a court of law.

—City of Eau Claire v. Payson, 107 Fed. 552.....46 C. C. A. 466

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See "Bankruptcy," § 1.

ASSOCIATIONS.

See "Building and Loan Associations."
Mutual benefit insurance associations, see "Insurance," § 9.

AUTHORITY.

Of agent, see "Principal and Agent," § 1.

BANKRUPTCY.

§ 1. Assignment, administration, and distribution of bankrupt's estate.

Bankr. Act 1898, § 70, declares that the bankrupt's trustee on his appointment and qualification shall be vested with the bankrupt's title to all property which prior to the filing of the petition the bankrupt could by any means have transferred. Philadelphia Stock Exchange Rules, art. 11, § 4, provides that any member wishing to sell his membership shall have the right to do so, provided he has no unsettled contracts with, or claims against him by, any member of the stock exchange, etc.,—subject, however, to the approval of the proper authorities of the exchange. *Held*, that a bankrupt having no unsettled accounts with members of the exchange at the time of filing his petition in bankruptcy could have transferred his seat, which was a valuable right, within section 70, and hence such right of transfer passed to his trustee in bankruptcy, who was entitled to sell the same as part of the bankrupt's assets.

—In re Page, 107 Fed. 89.....46 C. C. A. 160

To authorize the court to reopen the estate of a bankrupt, under Bankr. Act 1898, § 2, subd. 8, it should "appear" by some satisfactory evidence that there are assets unadministered, although no formal or technical procedure is required. An unverified petition filed by a creditor, stating on information and belief that the wife of the bankrupt has "money or property" belonging to him, without stating its character or amount, and which is unsupported by affidavits or other evidence, is insufficient to warrant any action by the court.

—In re Newton, 107 Fed. 429.....46 C. C. A. 399

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Where it is desired to reopen the estate of a bankrupt after it has been closed and the trustee discharged, the first step is properly the making of an order for that purpose, and it then devolves upon the creditors, under Bankr. Act 1898, § 44, to appoint a new trustee. The court has no authority to make such appointment unless the creditors fail to do so.
—In re Newton, 107 Fed. 429.....46 C. C. A. 399

A corporation executed mortgages covering all its property to favored creditors, who were not pressing it for payment nor asking to be secured, intending thereby to force indulgence from its other creditors and further advances from those secured. *Held*, that they were intended to hinder, delay, or defraud creditors, within Bankr. Act 1898, § 67, declaring void incumbrances made with such intent within four months prior to filing a petition in bankruptcy.
—In re Steininger Mercantile Co., 107 Fed. 669; Bainbridge State Bank v. Tonge, Id.....46 C. C. A. 548

In Alabama the bankrupt's wife may be an adverse claimant, within Bankr. Law 1898, § 23; Code Ala. § 2526, giving the wife full legal capacity to contract as if sole, except as otherwise provided, and the position that a wife may claim property adversely to her husband being supported by sections 2520–2537, and there being no statute qualifying her right to be an adverse claimant.
—Blumberg v. Bryan, 107 Fed. 673.....46 C. C. A. 552

A debtor, prior to his bankruptcy, had deeded to a trustee a bond and second mortgage on corporate property to secure advances made, and to be made, by two of his creditors. Thereafter a receiver was appointed for the corporation, and a plan of reorganization proposed. It did not provide that the two creditors referred to should release their claims against the bankrupt, but did so provide as to others, and contemplated foreclosure of the first mortgage. The second mortgage was foreclosed, and the corporate property bought in by the counsel who conducted the foreclosure. The title was then transferred by him to a new company, in return for common stock therein, which he transferred to the trustee before referred to, by whom it was distributed to various parties, the two creditors each receiving some. *Held*, on a claim that they were paid, that conceding that the plan was carried out, and that they had released their claims against the old company on receiving such stock, they still subsisted in full against the bankrupt, the stock merely taking the place of their former collateral security, and, being worthless, did not reduce the amount of their claims against him.
—In re Lorillard, 107 Fed. 677.....46 C. C. A. 553

§ 2. **Composition.**
Specifications in opposition to confirmation of a bankrupt's composition with creditors must be similar to specifications in opposition to a discharge, which, to conform to Bankr. Act 1898, §§ 14, 29, should show fraud on his part; and so, where specifications did not charge fraud, nor that the offer and acceptance were not in good faith, but did charge that the composition was not for the best interest of creditors, and a referee twice reported (the last time very fully, and accompanied with the testimony), finding in each case that it was for their best interest and was offered and accepted in good faith, the objecting creditor having the burden of proof, the court properly confirmed the composition on the referee's reports; confirmation being authorized by section 12d if the court is satisfied that it is for the best interest of creditors, that the bankrupt is not guilty of anything barring a discharge, and that the offer and acceptance were made in good faith.
—City Nat. Bank v. Doolittle, 107 Fed. 236.....46 C. C. A. 258

It is the duty of a creditor objecting to the confirmation of a bankrupt's composition with creditors to show by proper averments and by evidence sufficient grounds why the court should grant a rehearing and set aside the order confirming the composition.
—City Nat. Bank v. Doolittle, 107 Fed. 236.....46 C. C. A. 258

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§ 3. Rights, remedies, and discharge of bankrupt.

Where a debtor residing in Tennessee, shortly before filing his petition in bankruptcy, acting in good faith on the advice of his attorney, voluntarily conveyed his homestead to his wife, and afterwards, before his examination, receiving different advice, secured a reconveyance to himself, and on obtaining leave amended his schedule by including the homestead therein, such homestead should be set aside to the bankrupt in the bankruptcy proceedings, since the conveyance to his wife was not fraudulent in fact, and, as his creditors had no interest in or claim on his homestead interest in the land, the conveyance of such interest could not injure or be fraudulent as to them.

—In re Tollett, 106 Fed. 866.....46 C. C. A. 11

Debts existing under the bankruptcy act of 1867, and kept alive by subsequent judgment, are not excepted from the operation of the act of 1898.

—In re Herrman, 106 Fed. 987.....46 C. C. A. 77

The pendency of an application for the discharge of a bankrupt under the bankruptcy act of 1867 cannot be pleaded in bar of an application by the debtor for a discharge under the act of 1898.

—In re Herrman, 106 Fed. 987.....46 C. C. A. 77

An order refusing to discharge a bankrupt under the bankruptcy act of 1867 does not estop the bankrupt from applying for a discharge upon the same facts, and as to the same debt, under the act of 1898.

—In re Herrman, 106 Fed. 987.....46 C. C. A. 77

The action of an insolvent, in mingling money of his own with that of his wife, and depositing it together in banks in his wife's name, without keeping any books of account or records showing what portion of such deposits was owned by him, for the admitted purpose of preventing his creditors from reaching it, when such practice was continued until he filed his petition in voluntary bankruptcy, constituted a failure to keep books of account or records, with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy, which debars him from the right to a discharge under Bankr. Act 1898, § 14b.

—Bragassa v. St. Louis Cycle, 107 Fed. 77.....46 C. C. A. 154

Where a bankrupt was alleged to have made a certain statement not under oath, and afterwards denied the same under oath, his statement under oath was not proved to be false by proof that he made the contradictory statement not under oath.

—Bauman v. Feist, 107 Fed. 83.....46 C. C. A. 157

Where a bankrupt testified under oath on examination before a referee that he had not stated to certain parties that he had an interest in a certain firm, which firm in fact never engaged in business, such oath not having been made in connection with the administration of the bankrupt's estate or an act affecting the estate, will not bar a discharge under Bankr. Act 1898, § 14b, subd. 1, providing that the court shall discharge a bankrupt unless he has committed an offense punishable by imprisonment, and section 29b, declaring that the bankrupt shall be imprisoned on conviction of knowingly and fraudulently making a false oath in relation to any proceeding in bankruptcy.

—Bauman v. Feist, 107 Fed. 83.....46 C. C. A. 157

A bankrupt's discharge was not barred by the fact that the account books of a corporation, for which he was bookkeeper, and in which he had no interest, had been mutilated before they came into the possession of the corporation, under Bankr. Act 1898, § 14b, subd. 3, providing that the court shall not discharge a bankrupt who destroys or fails to keep books of account to conceal his true financial condition.

—Bauman v. Feist, 107 Fed. 83.....46 C. C. A. 157

§ 4. Costs and fees.

Where it becomes necessary to refer an application for a discharge to a referee for the taking of testimony, and the discharge is refused, it is not error to tax the fees of the referee to the bankrupt.

—Bragassa v. St. Louis Cycle, 107 Fed. 77.....46 C. C. A. 154

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Pending a petition in equity to the circuit court of appeals to superintend and revise a ruling of the court below overruling respondent's demurrer to a bill of complaint brought by a trustee in bankruptcy, the bill was voluntarily dismissed by complainant, on leave of court, without prejudice, and at his own cost. *Held*, that he should be required to pay the costs on the petition for review, dismissal of which was necessarily required by his action below.
—In re Orman, 107 Fed. 101; Adler v. Lane, Id.....46 C. C. A. 165

§ 5. Offenses against bankrupt laws.
An indictment charging the accused with having committed perjury by falsely omitting assets from his sworn schedule in bankruptcy, which alleges that he knew his schedule was false, and that he knew he was the owner of a specified sum of money in addition to what was mentioned in his schedule, is fatally defective, unless it also charges directly that he had other property than that described in his schedule.
—Bartlett v. United States, 106 Fed. 884.....46 C. C. A. 19

BANKS AND BANKING.

§ 1. National banks.
An owner of shares in a national bank, who sold the same in good faith, without knowledge or reason to believe that the bank was insolvent, and who did everything that was reasonably possible to have the proper formal transfer made on the books of the bank, cannot be treated as a shareholder, and held liable to an assessment made by the comptroller upon the subsequent closing of the bank as insolvent, upon evidence showing that the bank was in fact insolvent at the time the sale was made, and that the purchaser was also insolvent. The statute imposes no restriction upon the right to transfer shares because of the insolvency of the bank or the transferee, nor do considerations of public policy justify it where the seller has exercised due diligence, and has acted in the transaction with fairness and good faith.
—Earle v. Carson, 107 Fed. 639.....46 C. C. A. 498

A pledgee of shares of stock in a national bank as collateral security for a debt due him from the owner, with power of attorney to transfer the same on the books of the bank, does not become a stockholder, and liable to an assessment as such on the failure of the bank, contrary to his intention, by causing the stock to be transferred into the name of an employé, who holds it for the benefit of all parties interested, nor by any other action which is required or is proper for the protection of both his own interests and those of the pledgor, and not inconsistent with his retention of the stock merely as pledgee, such as paying an assessment required by the comptroller to make good the impaired capital of the bank, and charging the amount to the pledgor.
—Higgins v. Fidelity Ins., Trust & Safe Deposit Co., 108 Fed. 475....
46 C. C. A. 509

BAR.

Of action by former adjudication, see "Judgment," § 2.
Pendency of proceedings under bankruptcy act of 1867 as bar to proceedings under act of 1898, see "Bankruptcy," § 3.

BENEFICIAL ASSOCIATIONS.

Building or loan associations, see "Building and Loan Associations."
Mutual benefit insurance associations, see "Insurance," § 9.

BEST AND SECONDARY EVIDENCE.

In civil actions, see "Evidence," § 3.

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BILL OF LADING.

See "Shipping," § 2.

BILL OF REVIEW.

See "Equity," § 1.

BILLS AND NOTES.

In payment of assessment on stockholder of insurance company, see "Insurance," § 4.

§ 1. **Rights and liabilities on indorsement or transfer.**

Several weeks after a check was drawn and indorsed by the payee to an innocent purchaser for value, the drawer, in reliance on the payee's fraudulent representation that he had lost or misiaid it, and on his agreement to return it, overpaid the latter the full amount thereof on a settlement between them, though he would not have done so if the holder had promptly presented the check for payment. *Held*, that he was liable thereon notwithstanding the holder's unreasonable delay, as the overpayment was due proximately to his imprudent reliance on the payee.
—Bradley v. Andrus, 107 Fed. 196.....46 C. C. A. 238

BONA FIDE PURCHASERS.

Of bill of exchange or promissory note, see "Bills and Notes," § 1.

BONDS.

Municipal bonds, see "Municipal Corporations," § 3.
Of mint superintendent, see "United States," § 1.
Of postmaster, see "Post Office," § 1.
Sureties on bonds, see "Principal and Surety."
Township bonds, see "Towns," § 1.

BREACH.

Of condition, see "Insurance," § 5.
Of contract, see "Contracts," § 2.
Of covenant, see "Covenants," § 1.

BRIDGES.

§ 1. **Regulation and use for travel.**

In a suit for deficiencies in tolls, semiannual statements, made up from the monthly reports of the railroads using the bridge, were competent evidence thereof; their reliability as showing the actual receipts of the bridge company from the railroads affecting their weight only.
—Pittsburgh, C., C. & St. L. Ry. Co. v. Keokuk & H. Bridge Co., 107 Fed. 781 .....46 C. C. A. 639

In a suit on the contract for deficiencies in tolls, defendants claimed a release from liability by reason of complainants' reductions in the stipulated rates. On this question individual officers of defendants testified that they each had no information of the reduction, but the proof showed, on the other hand, that during the long period in question these reductions had been submitted to agents and experts of defendants for examination, and that they were not only reasonable, but necessary to

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prevent diversion of traffic and income. *Held*, in view of the well-known course of business, and the certainty that changes of rates over one line or system of railroads would soon be felt or known on other lines, and especially in view of the direct interest of defendants in the rates charged, that they must have known thereof, and that their failure to object before suit imported consent, and hence the reductions were no defense.
—Pittsburgh, C., C. & St. L. Ry. Co. v. Keokuk & H. Bridge Co., 107 Fed. 781 .....46 C. C. A. 639

While the purpose of the parties expressed in the contract was to provide a fund for the payment of interest on bonds which it was contemplated should be issued by the bridge company, the railroad companies had a direct interest in the construction and operation of the bridge; and hence, in a suit under the contract for deficiencies in tolls, from liability for which they claimed they had been released by reason of the bridge company's reduction in the stipulated rates, they could not assert the right of a surety or guarantor to insist that any departure from the letter of the contract by the bridge company, however slight, and even though beneficial, had worked their discharge.
—Pittsburgh, C., C. & St. L. Ry. Co. v. Keokuk & H. Bridge Co., 107 Fed. 781 .....46 C. C. A. 639

An amendment to the contract further stipulated that the revenues from all sources since the opening of the bridge should be first applied to the payment of interest on the bonded debt, and specified dividends on the capital stock of the bridge company, and the cost of "repairs, maintenance, and all expenses connected therewith, the surplus to belong to the railroad companies parties hereto." *Held*, that the obligations of the railroad companies were not enlarged or modified by the amendment, and hence, in a suit for deficiencies in tolls, they could not be made to pay fees paid by the bridge company to attorneys and one of its officers, and other expenses incurred in the litigation.
—Pittsburgh, C., C. & St. L. Ry. Co. v. Keokuk & H. Bridge Co., 107 Fed. 781 .....46 C. C. A. 639

BROKERS.

See "Factors"; "Principal and Agent."

BUILDING AND LOAN ASSOCIATIONS.

A loan by a Tennessee building and loan association, through a traveling soliciting agent, to a resident of Alabama, where all the business in connection therewith was transacted, with the single exception of the association's assent thereto, made when the association had no place of business and authorized local agent in the state, is a violation of Const. Ala. art. 14, § 4, and Code 1896, §§ 1316, 1318, 1319, enacted pursuant thereto, prohibiting foreign corporations from doing "any business" in the state without at least one known place of business and an authorized agent therein, and hence repayment of the loan cannot be enforced.
—Denson v. Chattanooga Nat. Building & Loan Ass'n, 107 Fed. 777.. 46 C. C. A. 634

CARGO.

See "Shipping."

CARRIERS.

Carriage of goods by vessels, see "Shipping," § 2.

§ 1. **Carriage of passengers.**
Plaintiff mounted the running board on the side of a street car, and while the car was in motion the conductor called to him to come forward

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to a vacant seat. In passing forward on the running board, he met the conductor, and in attempting to pass around him on the outside struck against a pillar standing near the track, and was injured. *Held*, that the fact that plaintiff was acting in obedience to the invitation or direction of the conductor, or that the conductor obstructed his passage, did not absolve him from the duty of exercising reasonable prudence and care for his own safety, and that, to entitle him to recover for the injury, it must appear from all the circumstances shown that in attempting to pass the conductor he acted with ordinary prudence.
—Third Ave. R. Co. v. Barton, 107 Fed. 215.....46 C. C. A. 241

CERTIFICATE.

Certified copies, see "Evidence," § 5.

CHALLENGE.

To juror, see "Jury," § 1.

CHANCERY.

See "Equity."

CHARACTER.

Of accused in criminal prosecutions, see "Criminal Law," § 1.
Of witness, see "Witnesses," § 2.

CHARGE.

To jury in civil actions, see "Trial," § 4.
To jury in criminal prosecutions, see "Criminal Law," § 2.

CHARTER PARTIES.

See "Shipping," § 2.

CHATTEL MORTGAGES.

§ 1. **Construction and operation.**
Rev. St. Tex. art. 3328, provides that mortgages or other instruments intended to operate as liens on undelivered personalty shall be absolutely void, as against subsequent mortgagees in good faith unless forthwith deposited for record; and hence a Texas chattel mortgagee that failed to record its mortgage till several months after another mortgagee had secured in good faith an effective mortgage on the same property lost its priority.
—Guaranty Trust Co. of New York v. Galveston City R. Co., 107 Fed. 311; Same v. City of Galveston, Id.....46 C. C. A. 305

§ 2. **Payment or performance of condition, release, and satisfaction.**
Though, on an issue as to whether prior to the execution of a chattel mortgage in renewal of a prior mortgage the parties agreed by a parol agreement to release from the lien of the first mortgage a portion of the property covered thereby, the renewal mortgage and a pencil memorandum of the parol agreement claimed to have been made by one of the parties at the time are admissible to support or contradict the agreement, the inferences deducible from the difference in the language of the two mortgages, and whether any memorandum was ever written, and,

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if written, what it contained, were questions for the consideration of the jury.
—Pecos Valley Bank v. Evans-Snider-Buel Co., 107 Fed. 654..... 46 C. C. A. 534

If, before the execution of a second renewal chattel mortgage on the same property, included in the first between the same parties, the parties agreed by parol that the mortgagor might dispose of a part of the mortgaged property free from the mortgage liens, and he did so, the rights thereby acquired by third parties to such released property are unaffected by the renewal mortgage.
—Pecos Valley Bank v. Evans-Snider-Buel Co., 107 Fed. 654..... 46 C. C. A. 534

CHECKS.

See "Bills and Notes."

CIRCUIT COURTS OF APPEALS.

See "Courts," § 1.

CITATION.

See "Process."
On appeal, see "Appeal and Error," § 4.

CITIES.

See "Municipal Corporations."

CITIZENS.

Citizenship ground of jurisdiction of United States courts, see "Courts," § 1.
Equal protection of laws, see "Constitutional Law," § 1.

CLAIMS.

Against estate of bankrupt, see "Bankruptcy," § 1.
Of patent, see "Patents," §§ 2, 3.

COLLATERAL UNDERTAKING.

See "Frauds, Statute of," § 1.

COLLECTION.

Of estate of decedent, see "Executors and Administrators," § 1.
Of taxes, see "Taxation," § 2.

COLLISION.

§ 1. **Steam vessels meeting or crossing.**
Where the one of two meeting steam vessels having the right of way fails to signal as required by the rules governing navigation on the lakes (28 Stat. 645), on approaching the other may properly signal by two blasts, in accordance with rule 23, meaning, "I am directing my course to port," and she is not required to wait for an answering signal before changing her course.
—The Vulcan and The Genevieve, 106 Fed. 989.....46 C. C. A. 87

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Where a steam vessel passing down the Detroit river in the night, and having the right of way, failed to signal, as required by the rules, when half a mile from a vessel passing up, and, on receiving a signal from the latter vessel when nearer, answered by a cross signal, changed her course accordingly, and continued at full speed, in violation of rule 26, although the vessels were then near together, she must be held in fault for a resulting collision.

—The Vulcan and The Genevieve, 106 Fed. 989.....46 C. C. A. 87

§ 2. **Steam vessels and sail vessels.**

A collision between a sloop yacht and a propeller, crossing in the night at an obtuse angle, *held* to have been due to the fault of both vessels,—of the yacht, in that she failed to have her lights properly screened, by reason of which they crossed and misled the propeller as to her course; and of the propeller, because she failed to take timely precaution to keep out of the way after discovering that the yacht did not keep the course she was at first supposed to be on.

—The City of Norwalk, 106 Fed. 982.....46 C. C. A. 63

A schooner, sailing closehauled at the speed of about three knots an hour, came into collision with a steamer, about 20 miles off Fire Island, in a thick fog, about 2 p. m. When the fog set in about half an hour before collision, the steamer slackened to half speed, which was about seven knots, and the only lookout prior to the collision was the first lieutenant, who stood on the bridge. The lieutenant heard the schooner's fog horn, and, looking in the direction from whence the sound came, saw the schooner's topmast on the starboard side, whereupon, at his signal, the steamer was at once reversed full speed, and three blasts of the whistle blown. The distance between the schooner and the steamer, when first seen, was about 80 meters. The schooner executed no maneuver after hearing the whistles of the steamer, and the schooner's master testified that the steamer was about 600 feet away when he first saw her. The seamen of the steamer, located forward of the bridge, did not see the schooner prior to the reversing of her engines, but were engaged in other work, and were not on the lookout. *Held*, that the steamer was at fault for the collision in failing to maintain a proper lookout in the crow's nest or forward of the bridge.

—The Patria, 107 Fed. 157.....46 C. C. A. 211

The schooner was also at fault for failure to attempt to avert the collision by luffing as soon as the steamer's signals were heard, in violation of the international rules (Act Aug. 19, 1890; Act May 28, 1894), declaring that when, in consequence of thick weather, the vessel entitled to hold her course finds herself so close that a collision cannot be avoided by the action of the giving-way vessel alone, she shall take such action as will best aid to avert collision.

—The Patria, 107 Fed. 157.....46 C. C. A. 211

§ 3. **Vessels in tow.**

Before daylight a tug came into collision with a boat in tow of a tug in a dense smoke coming from copper works on the shore. The lights of neither tug could be seen by the other until about 50 feet apart. No signals had been given, for the alleged reason that the smoke was not seen until the boats got into it, but the prevalence of such smoke in a north wind, such as was blowing at the time, was a well-known fact to all navigators. The boats were moving at the rate of about five miles an hour. *Held*, that the omission to give timely signals on both sides with the rate of speed was the cause of the collision, rendering both tugs liable.

—The Archie Crossman and The Gracie, 106 Fed. 985..46 C. C. A. 65

A tug was proceeding up the North river opposite the berth of an ocean steamship, with two vessels in tow at about midchannel. The tow was making against the ebb tide about three knots an hour. It is customary for ocean steamships backing from their berths to proceed out

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into the middle of the river to give room to straighten on their course. The steamship had signaled her intention to back out, and the men on the tug could have discovered that she was backing out when 1,400 feet below the steamship's berth, but they made no change in the speed or the course of the tug. The steamship did not observe the tug until it had passed about 300 feet beyond the steamship's course, when its engines were put to go ahead and her sternway checked, but the steamship's stern struck the second vessel of the tow. *Held*, as it was seven or eight minutes after the steamship commenced to back out before the collision, the tug had ample time to protect her tows from collision, and was liable for the injury.

—The St. Louis and The Robert Haddon, 107 Fed. 540..... 46 C. C. A. 454

§ 4. Fog or thick weather.

A tug returning from sea with two dumps in tow on a hawser collided at about 12 midnight, in a thick fog, with a ferryboat. Both boats gave proper signals, which were heard by each some four or five minutes before the collision, which occurred at about right angles. Each claimed that his own boat was stopped at the time of the contact. This evidence was rendered improbable from the severe injuries suffered by both vessels. The lights of the colliding vessels were discovered at a distance of from 100 to 200 feet. *Held*, that both vessels were in fault, in not sufficiently reducing their speed so as to have been able to come to a full stop after the discovery of the lights.

—The West Brooklyn, 106 Fed. 989.....46 C. C. A. 93

§ 5. Narrow channels, harbors, rivers, and canals.

A transfer tug passing down East river with a car float on either side *held* in fault for a collision with a schooner coming up in tow, which occurred as she was rounding Horn's Hook between the shore and the center of the channel, on the ground that, being in a position where careful navigation was required, owing to the number of vessels passing and the flood tide, after having agreed to allow the tug and schooner to pass ahead of her, she also assented to the signal of another tug coming up nearby, abreast of the schooner, with a tow on each side, to permit the latter to pass across her stern, and thereby placed herself in a situation where she was unable to avoid collision with one of the two passing vessels.

—The Transfer No. 9, 107 Fed. 533; The William J. Sewell, Id..... 46 C. C. A. 450

§ 6. Suits for damages.

In determining, on conflicting testimony, which of two vessels was in fault for a collision, the court will take into consideration the probabilities and presumptions based upon the skill, knowledge, and ability of the crews of the respective vessels, which was the better manned, and the less likely to make a mistake.

—The Vulcan and The Genevieve, 106 Fed. 989.....46 C. C. A. 87

In an action for collision, it appeared that a ferryboat struck a scow in tow on the forward end, which projected with an overhang. The collision was the fault of the ferryboat. The man on the tug examined her at the time with a lantern, it being after dark, and the scow being heavily laden and deep in the water. He discovered no apparent damage, and the tow proceeded. When some distance from the place of collision, the scow sank. An inspection after she was raised showed injury below the water line. *Held* insufficient to show negligence on the part of the tow in continuing on the voyage, so as to relieve the ferryboat from the consequences of the collision.

—The Albert H. Ellis, 107 Fed. 303; The Hudson City, Id..... 46 C. C. A. 297

COMBINATIONS.

See "Conspiracy."

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COMMERCE.

Carriage of goods and passengers, see "Shipping."

§ 1. **Power to regulate in general.**

The provision of Act March 2, 1895, that "any person who shall cause to be * * * carried from one state to another in the United States any paper, certificate, or instrument purporting to be or represent a ticket, chance, share, or interest in or dependent upon the event of a lottery * * * or similar enterprise," shall be guilty of an offense, is within the constitutional power of congress to regulate commerce among the states, and covers a case where an individual carries from one state into another a ticket or a slip of paper which is understood by all the parties to the transaction to represent the interest of the purchaser of a chance in a lottery or "policy" game in which the drawing has not taken place.

—Reilley v. United States, 106 Fed. 896.....46 C. C. A. 25

COMMISSION MERCHANTS.

See "Factors."

COMMON CARRIERS.

See "Carriers."

COMPETITION.

Unfair competition, see "Trade-Marks and Trade-Names," § 1.

COMPOSITIONS WITH CREDITORS.

In bankruptcy proceedings, see "Bankruptcy," § 2.

COMPROMISE AND SETTLEMENT.

See "Payment."

Plaintiff sued defendant for injuries sustained while in defendant's employ by its negligence, to which defendant pleaded a release for the sum of $1,500. Plaintiff replied that the release was prepared by defendant, and that, being deaf and unable to read English, plaintiff signed the paper under representations that it contained, in addition to the requirement of payment of $1,500, an agreement to furnish plaintiff with a life position, and that by reason of the failure of the compromise to contain such provision it was invalid, and the minds of the parties never met in any compromise or settlement. At the interview at which the settlement was made, plaintiff was represented by his wife and F., a friend; and, though it appeared that defendant's agent offered to employ plaintiff as long as he behaved himself, he expressly refused to make such provision part of the written contract. Before signing the agreement, F. went into an adjoining room with plaintiff and wife, and read the same to them; and he testified that it was understood that the provision for life employment would not be put in the contract. *Held*, that the evidence was not sufficient to show that plaintiff was deceived in the execution of the settlement, and hence a verdict for defendant was properly directed.

—Gladish v. Pennsylvania Co., 107 Fed. 61.....46 C. C. A. 150

COMPUTATION.

Of period of limitation, see "Limitation of Actions," § 2.

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CONDITIONS.

In deeds, see "Deeds," § 1.
In insurance policies, see "Insurance," § 5.

CONFLICT OF LAWS.

What law governs insurance, see "Insurance," § 8.

CONSIDERATION.

Of note given for assessment on stockholder in insurance company, see "Insurance," § 4.
Sufficiency of expression of consideration in memorandum within statute of frauds, see "Frauds, Statute of," § 2.

CONSIGNMENT.

See "Factors."

CONSPIRACY.

Appellate jurisdiction of circuit court of appeals, see "Courts," § 1.
Evidence of conspirators, see "Evidence," § 4.

§ 1. **Criminal responsibility.**

To sustain an indictment charging a conspiracy to commit an offense against the United States, under Rev. St. § 5440, it is not necessary that there should be direct evidence of a formal agreement; but it is sufficient if the evidence of the separate details of the transaction as it was carried out indicates with the requisite certainty the existence of a preconcerted plan and purpose.

—Reilley v. United States, 106 Fed. 896.....46 C. C. A. 25

Rev. St. U. S. §§ 5508, 5509, defining the offense of conspiracy to injure or intimidate citizens in the exercise of civil rights, and subjecting an offender, who has been guilty of a felony in connection therewith, to the punishment prescribed therefor by the state law, does not contemplate two distinct offenses against the United States; the conspiracy only being of federal cognizance, and made punishable, and the other crime being merely an aggravation thereof, so that if the conspiracy is not proved there can be no conviction for the felony.

—Davis v. United States, 107 Fed. 753.....46 C. C. A. 619

If, in a prosecution for conspiracy under such statute, the evidence shows a detail of facts and circumstances in which the alleged conspirators are involved, separately or collectively, and which are clearly referable to a preconcert of the actors, and there is a moral probability that they would not have occurred as they did without such preconcert, it is sufficient if it satisfies the jury beyond a reasonable doubt.

—Davis v. United States, 107 Fed. 753.....46 C. C. A. 619

In a prosecution for conspiracy under such statute, the alleged purpose of which was to prevent the arrest of defendant and others for violating the revenue laws, and including the crime of murder in aggravation thereof, a neighbor of defendant was allowed to testify that at the time when the officers attempted defendant's arrest, and a deputy marshal was killed, that defendant had a still, which at one time was east of his house, and then on the west side thereof. Another witness testified that he frequently visited defendant's house before the deputy was killed, and bought whisky of him; that he let defendant know he

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wanted it, and would lay his money down in a certain place, and after going back would find a bottle of whisky there and the money gone. Deputy marshals were allowed to testify that on a visit which they made to defendant's place a year or two before the occurrence in question they found whisky in jugs concealed about the premises, and that, on attempting to continue their search down a ravine leading from defendant's house, the latter and another appeared with guns, and compelled them to turn back. *Held*, that this evidence was properly admitted to prove the object and purpose of the conspiracy, and explain defendant's motive in entering into it, and in resisting the officers by firing on them and killing one of their number.

—Davis v. United States, 107 Fed. 753.....46 C. C. A. 619

In a prosecution under Rev. St. U. S. §§ 5508, 5509, for conspiracy, the alleged purpose of which was to prevent the arrest of defendant and others for violating the revenue laws, including a charge of murder in aggravation thereof, the court, having particularly in mind the period within which the conspiracy might have been formed prior to its execution, charged that it would be sufficient to establish it if defendant knew that the United States officials were coming for his lawful apprehension and arrest, and that then and there he and those associated with him, or any one or more of them, and named as his co-conspirators in the indictment, determined to resist the proposed or threatened arrest by force of arms, if necessary, or by flight; or if previously to that, at a time more or less remote, defendant and the alleged conspirators, any one or more of them, knew that the officers were coming wherever he might be, with lawful process to arrest defendant, and determined that they would resist, by his flight and their assistance to that end, or by force of arms, if necessary. *Held*, that the jury must have understood that the conspiracy, to be within the statute, must have included an agreement to resist the arrest of accused by force of arms, if the attempt to effect his escape by flight should fail, and that, thus construed, the instruction was not erroneous.

—Davis v. United States, 107 Fed. 753.....46 C. C. A. 619

CONSTITUTIONAL LAW.

§ 1. Equal protection of laws.

Rev. St. Tex. 1895, art. 3071, imposing on a "life or health insurance company" an additional liability for its failure to pay a loss within the time specified, consisting of 12 per cent. damages on its amount, and attorney's fees for its collection, is not repugnant to the provision of the federal constitution against taking property without due process of law, and guarantying all persons the equal protection of the law.

—Fidelity & Casualty Co. of New York v. Dorough, 107 Fed. 389.... 46 C. C. A. 364

CONTRACTS.

See "Use and Occupation."

Agreements within statute of frauds, see "Frauds, Statute of."

Assignment, see "Assignments."

Contracts of particular classes of parties, see "Master and Servant"; "Municipal Corporations," § 1.

Limitation of actions on contracts, see "Limitation of Actions," § 1.

Parol or extrinsic evidence, see "Evidence," § 6.

Particular modes of discharging contracts, see "Compromise and Settlement"; "Payment."

Particular classes of express contracts.

See "Bills and Notes"; "Covenants"; "Insurance"; "Principal and Agent"; "Sales."

Affreightment, see "Shipping," § 2.

Bills of lading, see "Shipping," § 2.

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Employment, see "Master and Servant."
For salvage, see "Salvage," § 1.
Suretyship, see "Principal and Surety."

§ 1. Requisites and validity.
A contract between a corporation and a stockholder by which the latter is to receive the par value or any part of his stock before all the corporate debts are paid is contrary to public policy and void.
—Guaranty Trust Co. of New York v. Galveston City R. Co., 107 Fed. 311; Same v. City of Galveston, Id.....46 C. C. A. 305

§ 2. Performance or breach.
An instruction that, inasmuch as a builder was prevented from going on with his contract, he was entitled to recover for what he had done, if his tender of performance by the correction of defects was made in good faith, was not incorrect because the tender may have been made on condition that sums claimed to be due should first be paid, and no reference was made thereto, as the condition was a circumstance to be considered by the jury with others in determining whether the tender was made in good faith.
—Cass County v. Gibson, 107 Fed. 363.....46 C. C. A. 341

CONVERSION.

Wrongful conversion of personal property, see "Trover and Conversion."

CONVEYANCES.

See "Homestead," § 1.
In fraud of creditors, see "Fraudulent Conveyances."
Particular classes of conveyances, see "Assignments"; "Chattel Mortgages"; "Deeds"; "Mortgages."

COPYRIGHTS.

§ 1. Infringement.
Rev. St. § 4965, as amended by Act 1895 (2 Supp. Rev. St. p. 437), providing that any infringer of a copyrighted photograph or publication, as therein specified, "shall forfeit to the proprietor all the plates on which the same shall be copied, and every sheet thereof, either copied or printed, and shall further forfeit one dollar for every sheet of the same found in his possession, either printing, printed, copied, published, imported or exposed for sale," is penal in character, and highly punitive in effect, and must be strictly construed. The provision imposing a penalty of one dollar per sheet applies only to such sheets as have been found in the defendant's possession for the purpose of forfeiture and condemnation under the preceding clause, and until the sheets have been so found no right of action to recover such penalty accrues.
—Falk v. Curtis Pub. Co., 107 Fed. 126.....46 C. C. A. 201

CORPORATIONS.

See "Taxation," § 2.

Particular classes of corporations.

See "Building and Loan Associations"; "Municipal Corporations"; "Street Railroads," § 1.
Insurance companies, see "Insurance," § 9.
Telegraph and telephone companies, see "Telegraphs and Telephones," § 1.
Water companies, see "Waters and Water Courses," § 1.

§ 1. Incorporation and organization.
Promoters of a corporation, who become stockholders therein, assume a trust relation to the company and the other stockholders, which binds

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them to act openly and in good faith in all matters connected with its organization, and the acquiring of the property necessary for the transaction of the business for which it is organized, and they will not be permitted to make a secret profit on the sale of such property to the corporation, at least when by making themselves officers and directors in the initial organization they control the corporation, and assume to act in its behalf in making the purchase.

—Yeiser v. United States Board & Paper Co., 107 Fed. 340..... 46 C. C. A. 567

Two of the defendants obtained an option to purchase a manufacturing plant for $75,000, their purpose being to organize a corporation to take over and operate the property. Together with the other defendants, whom they associated with them, they organized a corporation, placing the capital stock at $100,000, of which defendants subscribed for $25,000, and elected themselves its directors. The holders of the option made a proposition to sell the property to the corporation for $100,000, which was accepted by the directors, and upon that basis defendants sold stock to others. When sufficient had been sold and paid for to enable the company to make the purchase on the terms agreed upon in the option, the board of directors, which had been changed somewhat in its membership, but was still controlled by defendants, again voted to buy the property for $100,000, and it was purchased by the defendant, who was president of the company, and a deed taken directly from the owners to the company, reciting a consideration of "one dollar and other valuable considerations." By means of cross checks, it was made to appear on the books of the company that defendants had paid for their stock, when in fact it was received as a profit on the transfer of the property. The majority of the stockholders had no knowledge of the price actually paid to the former owner for the property, but supposed it to be $100,000, until after the company had taken possession and was operating the plant, when, on learning the facts, they elected other officers, and the company brought suit against defendants for the cancellation of their stock. *Held* that, under the circumstances shown, the benefit of the purchase made by the holders of the option inured to the company, regardless of the actual value of the property, and that, since the purchase from them could not be rescinded without great injustice to the company, the cancellation of the stock as prayed for was an appropriate remedy.

—Yeiser v. United States Board & Paper Co., 107 Fed. 340..... 46 C. C. A. 567

§ 2. Members and stockholders.

Rev. St. Ohio, §§ 3258–3260, provide, in accordance with the provisions of the state constitution, that stockholders in corporations shall be individually liable to creditors in an amount equal to their stock; that such liability shall be enforced in an action in behalf of all creditors and against all stockholders, in which the court shall determine the amount payable by each person liable on all the indebtedness of the corporation, and shall render judgment therefor against all stockholders served. The supreme court of the state has held such suit to be equitable in its nature, and one in which it is proper for the court, under the statutes of the state, to appoint a receiver to collect the amounts for which judgment has been therein rendered. *Held*, that it was also within the power of such court to authorize its receiver to bring suits against stockholders domiciled in other jurisdictions, and that a federal court in another jurisdiction should, on the principle of comity, recognize his right to maintain an action therein in behalf of all creditors to enforce the liability of a stockholder domiciled within its jurisdiction to an amount proportionate to that which domestic stockholders have been required to pay.

—Kirtley v. Holmes, 107 Fed. 1.....46 C. C. A. 102

Under Const. Ohio, art. 13, § 3, providing that "dues from corporations shall be secured by such individual liability of the stockholders, and other means, as may be prescribed by law; but in all cases each stockholder shall be liable over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum at least equal in amount

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to such stock,"—a contractual liability exists upon the part of every stockholder in an Ohio corporation to its creditors, in case of its insolvency, at least equal to the amount of his stock, which may be enforced in the federal courts against a stockholder domiciled in another jurisdiction, where the evidence in the case shows the insolvency of the corporation, that its indebtedness exceeds the stockholder's liability, and that assessments have been made by a court of Ohio, under its statutes, against domestic stockholders, to the full amount of their liability, so as to make it fully appear that the foreign stockholder will not be unjustly discriminated against.

—Kirtley v. Holmes, 107 Fed. 1.....46 C. C. A. 102

An ordinance of the city of Galveston embodied a contract between it and promoters of the Galveston City Railroad Company, whereby the latter was given the right to construct and operate its railway on condition that, in lieu of a percentage on its net receipts and of a bonus for the contract, 600 shares of its stock should be transferred to the city, as fully paid up. This was accordingly done, and it was entered as a stockholder on the company's books; and, as the ordinance provided, it was also represented by its mayor on the company's board of directors, when he voted for a resolution mortgaging the company's railway system. *Held*, that a further provision in the contract that, in the event that the company should allow itself to be incumbered with debt, the city should have a lien on the company's franchise and property, to be secured to it by proper process after its organization, did not make the city in any sense a creditor of the company, and that the lien was intended merely to secure its interest as a stockholder, giving it a preference in the distribution of the capital stock or net assets of the company, but postponing it to the rights of the mortgagee and other creditors.

—Guaranty Trust Co. of New York v. Galveston City R. Co., 107 Fed. 311; Same v. City of Galveston, Id.....46 C. C. A. 305

§ 3. Corporate powers and liabilities.

On an issue as to complainant's ownership of corporate stock, on which his right to maintain suit depended, a letter was produced, in which, referring to the stock in question, he stated that he did not recall the terms of a transfer thereof made to a gentleman of Boston, and that no doubt the person referred to, whom he named, would cheerfully show the transfer he executed; and if it gave, or the law gave, the purchaser the right to use his name as legal plaintiff, he had such right, and otherwise not, "as I have no interest whatever in the stock, and have not had since the date of the transfer." Besides, complainant testified that he could only say just what he said in the letter; that he had no interest in the stock whatever, but that, if counsel of the then owner needed the use of his name as legal plaintiff, and would protect him from any responsibility for the costs of litigation, he had no objection to its use; and that he knew nothing about the institution of the suit except what was stated in the letters in evidence. There was other testimony to the same effect. *Held*, that it was obvious that he was not the owner of the stock, and that he sustained no trust relation to the owners thereof entitling him to sue in his own name for their benefit.

—MacVeagh v. Denver City Water-Works, 107 Fed. 17.....46 C. C. A. 118

COSTS.

In bankruptcy, see "Bankruptcy," § 4.

COUNTIES.

§ 1. Government and officers.

The power vested by 1 How. Ann. St. § 483, in a Michigan county board of supervisors to erect a court house voted for by the county electors at

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a cost not to exceed a specified amount involves no judgment and discretion on the part of the board in the performance of business acts relating to details of construction under the contract and the supervision of the work, and hence they may delegate supervisory power to a building committee, with authority to direct extra work and make changes in the building contemplated in the general contract.

—Cass County v. Gibson, 107 Fed. 363.....46 C. C. A. 341

COUNTY BOARD.

See "Counties," § 1.

COURTS.

Province of court and jury, see "Trial," § 4.
Removal of action from state court to United States court, see "Removal of Causes."
Review of decisions, see "Appeal and Error."
Submission of question of jurisdiction to jury as separate issue, see "Trial," § 1.

§ 1. United States courts.

Decision of a state court showing the state's policy to liberally construe its exemption statutes is binding on the federal courts in considering whether or not certain real estate in such state is subject to execution issued out of the federal courts.

—Thompson v. McConnell, 107 Fed. 33.....46 C. C. A. 124

What real estate is subject to or exempt from execution issued from federal courts is governed by the law of the state where the real estate is situated.

—Thompson v. McConnell, 107 Fed. 33.....46 C. C. A. 124

Alleged error of a state court in not following the law of another state does not raise a federal question.

—Terry v. Davy, 107 Fed. 50.....46 C. C. A. 141

The circuit court of appeals has no power to review the judgment of a state supreme court.

—Terry v. Davy, 107 Fed. 50.....46 C. C. A. 141

Section 914 of the federal statutes was not intended to and did not conform the power or the practice of the federal courts to those of the state courts in matters relating to bills of exceptions, motions for new trials, and methods of review of their judgments.

—City of Manning v. German Ins. Co., 107 Fed. 52..46 C. C. A. 144

An order or decree refusing to dissolve, discharge, or vacate an injunction is not an order continuing the injunction, within Act June 6, 1900, giving the circuit court of appeals jurisdiction of such orders on appeal.

—Rowan v. Ide, 107 Fed. 161.....46 C. C. A. 214

An appeal to the circuit court of appeals from an order granting an injunction should be dismissed if not taken within 30 days, as required by Act June 6, 1900.

—Rowan v. Ide, 107 Fed. 161.....46 C. C. A. 214

An order appointing a receiver directed a party to deliver to him possession of property in controversy, and enjoined him from interfering with the receiver's possession, and thereafter an order was entered dismissing an application to set the injunction aside. *Held*, that the latter order was not equivalent to an order continuing the injunction, within the meaning of the act of June 6, 1900, amending section 7 of the judiciary act of 1891 (26 Stat. 828), and authorizing appeals from such orders to the circuit court of appeals.

—Heinze v. Butte & B. Consol. Min. Co., 107 Fed. 165.....
46 C. C. A. 219

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The federal courts adopt as the rule of decision as to fixtures the local law as established by the decisions of the courts of the state where the property is situated, when such decisions are explicit and uniform.
—New York Life Ins. Co. v. Allison, 107 Fed. 179....46 C. C. A. 229

A suit in equity lies to enjoin illegal taxation in Kentucky, as the statutes of that state do not afford an adequate remedy at law.
—Louisville Trust Co. v. Stone, 107 Fed. 305.....46 C. C. A. 290

Jurisdiction of a federal court having been properly invoked for relief against assessments as discriminating against complainant, and thus depriving it of the equal protection of the laws under the fourteenth amendment, the bill, where complainant fails to show discrimination, may be retained to administer relief on other grounds, though the state courts could afford adequate remedy.
—Louisville Trust Co. v. Stone, 107 Fed. 305.....46 C. C. A. 299

Every presumption being in favor of the propriety of the action of assessment officers, and errors of judgment on their part not being a subject for injunction, proof that systematic discrimination is being made against a complainant corporation must be clear and convincing, and conclusively preponderate over opposing evidence, before a federal court will interfere by injunction in its behalf.
—Louisville Trust Co. v. Stone, 107 Fed. 305.....46 C. C. A. 299

The federal courts will follow the supreme court of a state in the interpretation of its statutes.
—Guaranty Trust Co. of New York v. Galveston City R. Co., 107 Fed. 311; Same v. City of Galveston, Id.....46 C. C. A. 305

Rev. St. Tex. arts. 1472, 1489, 1490, authorizing the appointment of receivers, defining their powers and duties, and regulating their proceedings, are inapplicable to receivers in the federal courts.
—Guaranty Trust Co. of New York v. Galveston City R. Co., 107 Fed. 311; Same v. City of Galveston, Id.....46 C. C. A. 305

Whether plaintiff's demand for damages was colorable and exaggerated, to confer jurisdiction on the circuit court, presents a question for the court to decide, which, if proper to submit to the jury, should be submitted as to the facts, and separate from the merits.
—Mexican Cent. Ry. Co. v. Glover, 107 Fed. 356.....46 C. C. A. 334

The laws of Texas as to instructing the jury in writing do not obtain in the federal courts.
—Mexican Cent. Ry. Co. v. Glover, 107 Fed. 356.....46 C. C. A. 334

Where the curator of an insane person is not, by virtue of his appointment, vested with the title to his ward's realty, but is merely a custodian of the ward's personal property,—as under the statutes of Missouri,—and actions to recover real estate must be brought in the name of the ward, or in his name by his curator, the jurisdiction of a federal court in such an action is to be determined with reference to the citizenship of the insane person, and not that of his curator.
—Stout v. Rigney, 107 Fed. 545.....46 C. C. A. 459

A trustee in a mortgage executed by a water company, claiming the right by virtue of the provisions of such mortgage to collect rentals due the company, cannot maintain an action against a city to recover an amount alleged to be due the company as rentals in a federal court, where the company and city are corporations of the same state; his sole right to maintain such an action being as assignee of the contract between the city and company.
—City of Eau Claire v. Payson, 107 Fed. 552.....46 C. C. A. 466

Section 5, Cir. Ct. App. Act March 3, 1891 (31 C. C. A. viii., 90 Fed. viii.), amended by Act Feb. 18, 1895 (31 C. C. A. xlii., 90 Fed. xlii.), makes the criminal jurisdiction of the supreme court dependent on whether the crime of which a party has been convicted is capital; and hence where an indictment for conspiracy involves also a charge of murder in aggra-

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vation thereof, but conviction is for conspiracy only, the circuit court of appeals has jurisdiction, the latter offense not being capital.
—Davis v. United States, 107 Fed. 753.....46 C. C. A. 619

The federal courts decide for themselves whether for an actual or threatened invasion of a conceded or asserted right equity may afford relief.
—General Electric Ry. Co. v. Chicago, I. & L. Ry. Co., 107 Fed. 771... 46 C. C. A. 629

COVENANTS.

§ 1. **Performance or breach.**
A corporation organized for the purpose of establishing and maintaining an educational institution, and to which land has been conveyed upon a covenant that it shall be used exclusively as a campus for such institution, does not substantially violate such covenant by permitting a lessee to occupy a portion of the land for the purpose of drilling for oil thereon, where it appears that such occupation will probably be but temporary, and will not permanently injure the land for the purpose for which it was granted, and that the school is to be continued, and the revenue derived by the corporation from such use of the land devoted to its maintenance.
—Los Angeles University v. Swarth, 107 Fed. 798....46 C. C. A. 647

COVERTURE.

See "Husband and Wife."

CREDIBILITY.

Of witness, see "Witnesses," § 2.

CREDITORS.

See "Bankruptcy"; "Fraudulent Conveyances."
Of intestate, see "Descent and Distribution," § 1.
Remedies against surety, see "Principal and Surety," § 8.

CRIMINAL LAW.

See "Conspiracy," § 1; "Witnesses," § 2.
Appellate jurisdiction of circuit court of appeals, see "Courts," § 1.
Offenses against bankrupt laws, see "Bankruptcy," § 5.
Offenses against election laws, see "Elections," § 1.
Offenses against postal laws, see "Post Office," § 2.

§ 1. **Evidence.**
In a criminal trial in a federal court, where no testimony has been offered as to the previous character of the accused, a presumption of good character exists in his favor, of which, upon a request therefor, the jury should be instructed.
—Mullen v. United States, 106 Fed. 892.....46 C. C. A. 22

A letter, written to a defendant charged with having devised a scheme to defraud, to be effected by the use of the mails, by a person claimed to have been defrauded by means of such scheme, after the transaction on which the charge was based had been closed, which contained a narrative of the past transaction and charges of fraud against defendant, but which was not answered or acted on by him, was not admissible in evidence against him, either as part of the res gestæ or as implying an admission

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on his part of the truth of the statements made therein; and its admission over his objection was prejudicial error.
—Packer v. United States, 106 Fed. 906.....46 C. C. A. 35

In a prosecution for devising a scheme to defraud by use of the mails, the question of fraudulent intent being the principal issue, other similar business transactions, conducted by defendant a year prior to those charged in the indictment, are not so remote in time that the court may not, in its discretion, permit them to be proved. Such evidence does not tend to prove that defendant had devised a scheme to defraud by the use of the mails, but that he was then engaged in a scheme similar in other particulars to that charged, the fraudulent character of which is in issue.
—Packer v. United States, 106 Fed. 906.....46 C. C. A. 35

§ 2. Trial.
It is prejudicial error for the court, in charging the jury in a criminal case, to comment unfavorably upon the general character of the accused, or to intimate his opinion that the accused is not of good character, where there was no evidence in the case upon the subject. It is only permissible for a judge in a federal court to express an opinion on the facts when it is based upon evidence in the case; and such comment is, moreover, inconsistent with the presumption of good character which the law raises in favor of the accused, and deprives him of the benefit of such presumption with the jury.
—Mullen v. United States, 106 Fed. 892.....46 C. C. A. 22

§ 3. Judgment, sentence, and final commitment.
The mere announcement of the sentence imposed on a defendant who has been convicted of a criminal offense does not preclude the court from reconsidering such sentence, and imposing a heavier one, before the sentence announced has been entered of record, and while the defendant is still within the bar; nor can it be presumed that the sentence was increased because of a statement by defendant's counsel of his intention to appeal, made after the first sentence was announced.
—Nichols v. United States, 106 Fed. 672.....46 C. C. A. 405

§ 4. Appeal and error, and certiorari.
It is the established rule in the courts of the United States that, to entitle a party to a review of rulings admitting evidence, counsel, in making their objections, must state the grounds thereof.
—Reilley v. United States, 106 Fed. 896.....46 C. C. A. 25

The fundamental distinction existing at common law between appeals and writs of error has always been recognized and maintained in the appellate procedure of the courts of the United States, and a judgment in an action at law or in a criminal case has never been reviewable except by writ of error; nor was it the purpose of congress to change such rule by Act Jan. 20, 1897 (29 Stat. 492), amending section 5 of the act creating the circuit courts of appeals by transferring from the supreme court to such courts appellate jurisdiction in a certain class of criminal cases, and which provides that "appeals or writs of error may be taken from the district courts or circuit courts to the proper circuit court of appeals in cases of conviction of an infamous crime not capital." The words "appeal or writ of error" are used in several places in the original act, not as permitting the use of the remedies interchangeably, but the use of either as should be appropriate to the case; and, construing the amendment in connection with the other provisions of the act, it cannot be held to confer jurisdiction upon a circuit court of appeals to review a criminal case by appeal.
—De Lemos v. United States, 107 Fed. 121.....46 C. C. A. 196

An objection to the admission of evidence that it is incompetent is not available on writ of error, as it is not specific, and does not distinctly indicate the grounds of the objection.
—Davis v. United States, 107 Fed. 753.....46 C. C. A. 619

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CROSS-EXAMINATION.

See "Witnesses," § 1.

CUSTOMS DUTIES.

§ 1. Goods subject to duty, rate, and amount.

Except for the purpose of imposing a penalty for importing a bale containing more than 15 per cent. of wrapper and less than 85 per cent. of filler, any percentage system is abandoned in the tariff act of 1897: and all wrapper tobacco, wherever found, and in whatever amount, is subject to the duty of $1.85 per pound, provided in paragraph 213 of said act.

—Rothschild v. United States, 106 Fed. 989.....46 C. C. A. 86

Women's corsets made of cotton and other materials, trimmed around the upper border with cotton-lace edgings, whose relative value to the corsets is from 1 to 2 per cent., should be regarded as "wearing apparel * * * made wholly or in part of lace, or in imitation of lace," within Act 1897, par. 339, and classified for duty accordingly.

—United States v. Altman, 107 Fed. 15.....46 C. C. A. 116

Camphor oil obtained in a crude state from the same tree as crude gum camphor, the two being united without chemical connection, and separated merely by drainage, is not dutiable as "essential oil," within Tariff Act 1894, par. 60, and Act 1897, par. 3, nor should it be classified as "waste," but the same is dutiable as a nonenumerated unmanufactured article.

—United States v. Dodge, 107 Fed. 106.....46 C. C. A. 166

Under Act 1897, par. 281, providing for a duty on chocolate, and that "the weight and value of all coverings other than plain wooden, shall be included in the dutiable weight and value" thereof, the dutiable value of chocolate packed in tin boxes should be arrived at by adding the number of pounds of the chocolate and the tin coverings, and the outside wooden boxes in which it is packed for transit should not be included, pursuant to the method of estimating the value prescribed by section 19 of the customs administrative act of 1890, since the later statute plainly intends that the wooden coverings should be free from duty, and the interior coverings alone treated for duty purposes as if they were chocolate.

—United States v. Volkmann, 107 Fed. 109.....46 C. C. A. 169

Anthracite coal, containing less than 92 per centum of fixed carbon, is within paragraph 415 of the tariff act of 1897, which imposes a duty on "coal, bituminous, and all coals containing less than 92 per centum of fixed carbon," and is not entitled to free entry under paragraph 523, in the free list, which includes "coal, anthracite, not specially provided for in this act."

—Evans v. Collector of Customs of Port of San Francisco, 107 Fed. 110 .....46 C. C. A. 170

Act 1897, par. 191, imposes specific and ad valorem duties on "watch movements, whether imported in cases or not," and then provides that "watch cases and parts of watches" shall pay 40 per cent. ad valorem. *Held*, that while such paragraph assumed that completed watches, including case and works, would sometimes be imported, it nevertheless imposed duties on the cases separately, and that they were not dutiable as an entirety, under the first half of such paragraph, as "watch movements in cases."

—Racine v. United States, 107 Fed. 111.....46 C. C. A. 171

Beaded net lace, made of silk, is subject to customs duty under Tariff Act 1894, par. 354, as manufactures known commercially as "bead, bead-

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ed, or jet trimmings or ornaments," at 35 per cent. ad valorem, and not under paragraph 301, at 50 per cent. ad valorem.
—Morrison v. United States, 107 Fed. 113.....46 C. C. A. 173

Composition metal of which copper is the component material of chief value, in sheets which require to be reworked before the metal is available for use, is not dutiable under paragraph 177 of the tariff act of 1894, as a partly manufactured article composed wholly or in part of any metal, but is entitled to free entry under paragraph 452.
—Grempler v. United States, 107 Fed. 687.....46 C. C. A. 557

§ 2. **Entry and appraisal of goods, bonds, and warehouses.**
Where, under Act 1897, § 5, providing that, when any country shall pay any bounty on the exportation of merchandise dutiable in this country, there shall be levied an additional duty equal to the bounty, Holland gives bounty for the production of sugar, to be deducted from the excise thereon, but such excise is remitted on exportation, the duty is a grant on the exportation, and should be added to the regular duty on importation of sugar from that country.
—United States v. Hills Bros. Co., 107 Fed. 107.....46 C. C. A. 167

Where importers distinctly testified that the board of general appraisers made no personal examination or investigation of invoices in question, as required by Rev. St. § 2901, and no opposing evidence was presented, the facts must be regarded as proved, notwithstanding the presumption in favor of the correctness of official action, and the appraisement must be held invalid.
—United States v. Loeb, 107 Fed. 692.....46 C. C. A. 562

Paragraph 845 of the treasury regulations provides that appraisers shall make advances on invoices on the unit value declared on entry, in the currency in which the invoice is made out, in a specific sum per pound, yard, or other unit of value, and not by percentage, and in the weight, gauge, or measure expressed in the invoice, but that no average valuation shall be made, and that the additions shall be made by writing on the invoice, opposite each item advanced, the words, "add to make market value," stating in numerals the amount necessary to make the price per unit. *Held* directory, and not mandatory, in the sense that neglect to conform thereto would create an illegal appraisal.
—United States v. Loeb, 107 Fed. 692.....46 C. C. A. 562

The customs administrative act of 1890 provides (section 10) that the appraisers shall ascertain the actual market value and wholesale price of the merchandise at the time of exportation, "and the number of yards, parcels or quantities, and the actual market value or wholesale price of every one of them, as the case may require." Pursuant thereto the board of general appraisers made a report as to importations of Swiss laces, embroideries, and handkerchiefs, adding percentages to value, as appears by the following example: "On items invoiced at 18 centimes, stitch rate, add 36%; on balance of goods, add 10%." They did not, however, carry out on the invoice the value per aune (the Swiss unit) in francs and centimes, though this could easily be computed by the customhouse officers. *Held*, that there was no violation of the requirements of the statute.
—United States v. Loeb, 107 Fed. 692.....46 C. C. A. 562

While, as a general rule, the valuation of appraisers is conclusive on all parties, the appraisement may be impeached if the appraiser or collector proceeded on a wrong principle, contrary to law, or transcended the power conferred by statute, or did not comply therewith.
—United States v. Loeb, 107 Fed. 692.....46 C. C. A. 562

The customs administrative act of 1890 provides (section 13) that, if the collector shall deem the appraisement of any imported merchandise too low, he may order a reappraisement by one of the general appraisers, and that if the importer, owner, etc., shall be dissatisfied, and give notice thereof, or if the collector shall deem the reappraisement too low,

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he "shall transmit the invoice, and all the papers appertaining thereto," to the board of three general appraisers, to examine and finally decide the case. *Held*, that formal notice to the board of dissatisfaction by either the importer or collector was not needed to give it jurisdiction, transmission to it of the designated papers being sufficient, and hence the fact that a collector was satisfied, but ordered a reappraisement pursuant to instructions from the treasury department, would not nullify its action.

—United States v. Loeb, 107 Fed. 692.....46 C. C. A. 562

DAMAGES.

For refusal to pay insurance, see "Insurance," § 7.

§ 1. Pleading, evidence, and assessment.

The question of whether plaintiff's impairment of eyesight was attributable to the accident, where she received blows on other parts of the body, and a nervous shock, should not be left to the jury, there being no testimony or proof that such blows might be expected to produce such impairment.

—Brooklyn Heights R. Co. v. MacLaury, 107 Fed. 644..... 46 C. C. A. 523

DEBTOR AND CREDITOR.

See "Bankruptcy"; "Fraudulent Conveyances."

DECEDENTS.

Estates, see "Descent and Distribution"; "Executors and Administrators."

DEEDS.

See "Homestead," § 1.
Covenants in deeds, see "Covenants."
In fraud of creditors, see "Fraudulent Conveyances."

§ 1. Construction and operation.

If it is doubtful whether a clause in a deed was intended as a covenant or a condition, a court will incline against the latter construction.

—Los Angeles University v. Swarth, 107 Fed. 798....46 C. C. A. 647

A deed conveying land to a university corporation recited that the conveyance was made "upon the express conditions and for the consideration hereinafter named, to wit:" First, that the land should be devoted exclusively as a part of the campus of the university, and that no buildings should be erected thereon except those devoted to university purposes; second, that at least one building, to cost not less than a sum named, should be erected within a specified time; third, that in case of the abandonment of the premises for university purposes, or nonuser, or use for other purposes, before a stated time, the title should revert, but that there should be no reversion after the date so designated. *Held*, that the second and third clauses stated conditions from which the land became freed on the expiration of the time named, but that the first, in view of the circumstances and purpose of the conveyance, must be construed as a covenant running with the land, for the breach of which the grantor could recover damages, or which he could enforce performance of in equity in a proper case.

—Los Angeles University v. Swarth, 107 Fed. 798....46 C. C. A. 647

The consequence of the nonfulfillment of a condition on which real estate is conveyed is a forfeiture of the estate; hence, where the deed provides that there shall be no reversion after a certain time for the

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failure to perform any conditions therein imposed, after the expiration of such time the estate is freed from such conditions, and the grant becomes absolute.
—Los Angeles University v. Swarth, 107 Fed. 798....46 C. C. A. 647

DEFAMATION.

See "Libel and Slander."

DELIVERY.

Of goods sold, see "Sales," § 1.
Of mortgage, see "Mortgages," § 1.

DEMURRAGE.

See "Shipping," § 3.

DEPOSITIONS.

See "Witnesses."

DESCENT AND DISTRIBUTION.

See "Executors and Administrators."

§ 1. **Rights and liabilities of heirs and distributees.**
Where the statutes of a state permit a creditor to follow the lands of a decedent in the hands of his heirs, or when conveyed to others than bona fide purchasers for value, and it is shown that there are no debts of the estate other than the one sued on, and that it has no property except lands which have been conveyed by the heirs to the widow of the decedent without consideration, a federal court may entertain a suit in equity by a creditor to establish his claim against the estate, and enforce the same against such lands, subject to such rights of dower or homestead as are given the widow therein by the state statutes.
—Kirtley v. Holmes, 107 Fed. 1.....46 C. C. A. 102

DIRECTING VERDICT.

In civil actions, see "Trial," § 3.

DISCHARGE.

From employment, see "Master and Servant," § 1.
From indebtedness, see "Bankruptcy," § 3; "Compromise and Settlement."
From liability as surety, see "Principal and Surety," § 2.
From liability as trustee, see "Bankruptcy," § 1.

DISCRETION OF COURT.

Review, see "Appeal and Error," § 7.

DISMISSAL AND NONSUIT.

Dismissal of cause removed from state court, see "Removal of Causes," § 2.

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DISTRIBUTION.

Of estate of decedent, see "Descent and Distribution."

DIVERSE CITIZENSHIP.

Ground of jurisdiction of United States courts, see "Courts," § 1.

DOCUMENTS.

As evidence in civil actions, see "Evidence," § 5.

DOMICILE.

Residence as ground of jurisdiction, see "Courts," § 1.

DUE PROCESS OF LAW.

See "Constitutional Law," § 1.

DUTIES.

Customs duties, see "Customs Duties."
Excise duties, see "Internal Revenue."

EJECTMENT.

See "Trespass to Try Title."

ELECTIONS.

§ 1. **Violations of election laws.**
Rev. St. § 5507, providing that "every person who prevents, hinders, controls, or intimidates another from exercising or in exercising the right of suffrage, to whom that right is guaranteed by the fifteenth amendment to the constitution of the United States, by means of bribery or threats," etc., shall be punished, is void, as beyond the constitutional power of congress. The only power possessed by congress to legislate with reference to elections held solely for state or municipal purposes is derived from the fifteenth constitutional amendment, providing that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude," and that "the congress shall have power to enforce this article by appropriate legislation"; but the right conferred by such article, and which congress may enforce by legislation, is not the right of suffrage, but the right of the citizen to exemption from being discriminated against in the exercise of the elective franchise by the United States or a state on account of race, color, or previous condition of servitude, while the statute is not limited to the enforcement of such right, and in fact has no relation to it, but is so broad in its terms as to make punishable as a criminal offense an act of a private person committed at a state election, if committed against a voter of African descent, although it has no relation to the race, color, or previous condition of such voter.
—Lackey v. United States, 107 Fed. 114.....46 C. C. A. 189

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EMPLOYES.

See "Master and Servant."

ENTRY.

Of public lands, see "Public Lands," § 1.

EQUITY.

See "Fraudulent Conveyances"; "Trusts."
Equitable estoppel, see "Estoppel," § 1.
Federal jurisdiction, see "Courts," § 1.
Suits for infringement of patents, see "Patents," § 4.

§ 1. Bill of review.
A bill of review, on the ground of fraud in obtaining the decrees sought to be reviewed, should show how complainants were put on inquiry as to the alleged facts; by what means they learned them; or why the discovery, by the exercise of ordinary prudence, might not have been made when the litigation was begun.
—Pittsburgh, C., C. & St. L. Ry. Co. v. Keokuk & H. Bridge Co., 107 Fed. 781 ..... 46 C. C. A. 639

A bill of review for newly-discovered evidence should be brought in the court in which the decrees sought to be reviewed were rendered, leave therefor being first obtained from the supreme court and circuit court of appeals, by which they were affirmed.
—Pittsburgh, C., C. & St. L. Ry. Co. v. Keokuk & H. Bridge Co., 107 Fed. 781 ..... 46 C. C. A. 639

ERROR, WRIT OF.

See "Appeal and Error."

ESTATES.

Decedents' estates, see "Descent and Distribution"; "Executors and Administrators."

ESTOPPEL.

By judgment, see "Judgment," §§ 2, 3.

§ 1. Equitable estoppel.
As against an innocent purchaser of Porterfield scrip, the government, and, a fortiori, a stranger, are estopped from claiming that the government is the owner, or that the land warrant is invalid, because a former owner twice tendered it to the United States in payment for a cash entry and patent of land, and the government twice refused to accept it.
—James v. Germania Iron Co., 107 Fed. 597; Belden v. Midway Co., Id. ..... 46 C. C. A. 476

EVIDENCE.

See "Witnesses."
As to payment, see "Payment," § 1.
In action for libel, see "Libel and Slander," § 2.
In action on bond of postmaster, see "Post Office," § 1.
In action on insurance policy, see "Insurance," § 8.
In criminal prosecutions, see "Conspiracy," § 1; "Criminal Law," § 1.

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Questions of fact for jury, see "Trial," § 3.
Reception at trial, see "Trial," § 2.
Review on appeal in admiralty, see "Admiralty," § 1.
Review on appeal or writ of error, see "Appeal and Error," § 7.

§ 1. Presumptions.

In the absence of proof, it is to be presumed that in the matter of the liability of an employer for his negligence resulting in injuries to an employé, the law of Mexico is the same as the law of Texas, in both of which the civil law originally prevailed.

—Mexican Cent. Ry. Co. v. Glover, 107 Fed. 356.....46 C. C. A. 334

§ 2. Relevancy, materiality, and competency in general.

Plaintiff, suing for a libel charging him with robbing his employer, was properly allowed to state that certain check marks were made in the presence of his wife and himself in a book kept by him, when the items so checked came back to him with the signature of his employer's representative, with whom all the business in question was transacted, saying they were all right, such testimony being preliminary to the offer of the book in evidence.

—Tribune Ass'n v. Follwell, 107 Fed. 646.....46 C. C. A. 526

§ 3. Best and secondary evidence.

Rev. St. Mo. 1899, § 941, as construed by the supreme court of the state, requires proof of the loss or destruction of an original deed conveying military bounty lands, to render a certified copy of the record of such deed admissible in evidence, only where such deed was executed in another state, and not acknowledged in conformity with the laws of Missouri. Where such deed was acknowledged in substantial conformity with the laws of the state, although executed and acknowledged in another state, a copy is admissible upon its being shown to the court that the original "is not within the power of the party wishing to use the same" (Rev. St. Mo. 1899, § 933), and such proof is waived where no specific objection is made on that ground to the introduction of the copy.

—Stout v. Rigney, 107 Fed. 545.....46 C. C. A. 459

Notice to produce a memorandum, as a condition precedent to parol evidence of its contents, was not required, where the party who was claimed to have made it and to have had it in his possession had already testified that it never existed.

—Pecos Valley Bank v. Evans-Snider-Buel Co., 107 Fed. 654.....
46 C. C. A. 534

§ 4. Admissions.

Where, in an action on an accident policy for injuries resulting in the death of the insured, defendant introduced the deposition of witness to a conversation with deceased, 13 days after the accident, intended to show how it occurred, it was competent for plaintiff to prove by persons present that it was entirely different, and to show what in fact were the statements of deceased in such conversation in relation to the accident, whether they were a part of the res gestæ or not, and no predicate was needed for such evidence after proof of the conversation by defendant.

—Fidelity & Casualty Co. of New York v. Dorough, 107 Fed. 389....
46 C. C. A. 364

To an action brought by a wife upon a policy of insurance on the life of her husband, which was issued for her sole use and benefit, the insurer pleaded that her husband, one J. H. Brown, and Levi Baldwin and divers other persons to the defendant unknown, unlawfully conspiring and intending to defraud the defendant and two other insurance companies, took out the policy in suit and two policies on the husband's life in other companies, and thereafter, in pursuance of said fraudulent combination, did falsely pretend that plaintiff's husband had been killed, and that a certain dead body produced was his body, whereas plaintiff's husband was not in fact dead, but was concealing himself for the purpose of consummating the alleged conspiracy. *Held*, that the plea did not charge

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or allege that the plaintiff ever became a party to the conspiracy, and that unsworn statements of Baldwin, one of the alleged conspirators, which were made prior to the issuance of the policy in suit, were not admissible against the plaintiff in an action by her alone upon the policy; that the declarations of a conspirator are only admissible against a fellow conspirator when they are made in connection with the doing of some act in execution of, or in furtherance of, the objects of the conspiracy, so as to form a part of the res gestæ, and that within this rule some of the excluded declarations of Baldwin were not admissible against the plaintiff, even if she was a party to the conspiracy, because they were merely narrative of past transactions, and not a part of the res gestæ.

—Connecticut Mut. Life Ins. Co. v. Hillmon, 107 Fed. 834..... 46 C. C. A. 668

§ 5. **Documentary evidence.**

A purported transfer of a Texas land certificate was apparently executed in 1839, an assignment thereot duly acknowledged by the assignor in 1858, duly recorded in 1859, and duly certified from the proper archives of the county of record. *Held*, that it was admissible as a duly proved and authenticated document.

—Massenberg v. Denison, 107 Fed. 18.....46 C. C. A. 120

§ 6. **Parol or extrinsic evidence affecting writings.**

Parol evidence of an agreement to annul or modify provisions of a chattel mortgage is not inadmissible because it shows that a pencil memorandum thereof was made by one of the parties, and read by the witness testifying thereto, and which would have been admissible to support such parol evidence if produced and offered for that purpose.

—Pecos Valley Bank v. Evans-Snider-Buel Co., 107 Fed. 654..... 46 C. C. A. 534

Provisions of a chattel mortgage of sheep that their wool may be shorn and marketed by mortgagor, with the written consent of mortgagee, and the proceeds applied to the mortgage debt, and that mortgagee may seize or recover the wool, or the proceeds thereof, to apply on the debt and for other mortgage purposes, may be annulled or modified by a parol agreement between the parties.

—Pecos Valley Bank v. Evans-Snider-Buel Co., 107 Fed. 654..... 46 C. C. A. 534

§ 7. **Opinion evidence.**

Where the facts touching the question whether a machine was impracticable and unsafe cannot be fully communicated to the jury, expert opinion is competent.

—Hutchinson Cooperage Co. v. Snider, 107 Fed. 633..46 C. C. A. 517

EXAMINATION.

Of witnesses in general, see "Witnesses," § 1.

EXCEPTIONS, BILL OF.

Necessity for purpose of review, see "Appeal and Error," §§ 2, 5.

EXCHANGES.

Seat in exchange as asset in bankruptcy, see "Bankruptcy," § 1.

EXCISE.

Duties, see "Internal Revenue."

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EXECUTION.

State laws as rules of decision, see "Courts," § 1.

EXECUTORS AND ADMINISTRATORS.

See "Descent and Distribution."

§ 1. **Collection and management of estate.**
The act of Texas of January 22, 1836 (1 Sayles' [Old] Laws Tex. p. 366), provides that all proceedings relative to successions, etc., should conform to the Louisiana laws, and the act of Louisiana of January 17, 1838, in force in 1839, providing for the appointment, without notice, of curators for successions amounting to less than $500, declares, for the purpose of diminishing costs, that a curator of such a succession should cause its effects to be sold, and the proceeds applied to pay the decedent's debts in as summary a manner as possible, under the immediate direction of the court. *Held*, that a Texas land certificate transferred in 1839 by an administrator was personalty, and in view of these provisions no order of court for its legal sale and transfer was necessary, it being all the property belonging to the decedent's estate, and worth much less than $500.
—Massenberg v. Denison, 107 Fed. 18.....46 C. C. A. 120

§ 2. **Sales and conveyances under order of court.**
After possession and use of a Texas land certificate for 60 years from its unimpeached transfer by an administrator, and 25 years' continued use and possession of the lands patented thereunder, improving the same, and paying taxes thereon, an order of court for the sale of the land, referred to in the transfer, will be presumed.
—Massenberg v. Denison, 107 Fed. 18.....46 C. C. A. 120

EXEMPTIONS.

See "Homestead."
Of shipowners from liability, see "Shipping," § 2.
State laws as rules of decision, see "Courts," § 1.

EXPERT TESTIMONY.

In civil actions, see "Evidence," § 7.

FACTORS.

See "Principal and Agent."

J. & Co., factors in Pennsylvania, received a consignment of wool from another Pennsylvania factor, and made advances without notice that their consignor was not the actual owner. J. & Co. shipped the wool to Massachusetts, to purchasers; but, before delivery, defendant seized the same in replevin, and, being unsuccessful in the suit, defendant elected to hold the wool and pay its full value, with damages, under a stipulation with J. & Co.; whereupon plaintiff, the original owner, brought trover for its conversion. *Held*, that the stipulation amounted to a sale, which J. & Co.'s consignors had a right to make under Pennsylvania Factor's Act, § 3, declaring that, where a factor disposes of or pledges property in his possession as security for advances, the transferee acquires the title; and hence defendant acquired a good title to the wool from J. & Co., and plaintiff could not recover.
—Foerderer v. Tradesmen's Nat. Bank, 107 Fed. 219..46 C. C. A. 243

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FEDERAL COURTS.

See "Courts," § 1.

FEDERAL QUESTIONS.

See "Courts," § 1.

FEES.

In bankruptcy, see "Bankruptcy," § 4.

FELLOW SERVANTS.

See "Master and Servant," § 2.

FINAL JUDGMENT.

Appealability, see "Appeal and Error," § 1.

FINDINGS.

Review on appeal in admiralty, see "Admiralty," § 1.
Review on appeal or writ of error, see "Appeal and Error," § 7.

FIXTURES.

State laws as rules of decision, see "Courts," § 1.

Under the decisions of the New York courts, a machine does not become a part of the realty by merely attaching it to a building, without the intention to make it a permanent accession, when it is not so incorporated with the building as to lose its identity or to render its removal injurious to the building, unless it is essential to the use to which the part of the building in which it is connected is appropriated.
—New York Life Ins. Co. v. Allison, 107 Fed. 179....46 C. C. A. 229

Whether pumping engines used in a theater building to pump water into tanks on the top of the building, and to keep filled the standpipes required by the law of the state to be maintained in such buildings, where they are removable without injury to the building, are a part of building, and realty as between mortgagor and mortgagee, is a question of fact, depending to some extent upon whether or not they are essential to the proper equipment of the building, and not alone upon the intention of the owner. Where they are only a matter of convenience, and the building contains other pumps which can be used for the same purposes, effect may be given to the intention of the owner that they should remain personal property, but otherwise they are not removable from the building.
—New York Life Ins. Co. v. Allison, 107 Fed. 179....46 C. C. A. 229

Electric lighting fixtures used in and about a theater building, and detachable without injury thereto, such as switch boards used to connect a dynamo with the permanent wiring of the building, chandeliers, and an electric sign, all of which are capable of being used elsewhere, are not a part of the realty, but chattels, under the law of New York.
—New York Life Ins. Co. v. Allison, 107 Fed. 179....46 C. C. A. 229

Stage scenery used in a theater, consisting of loose articles which can as well be used in another theater, is personal property.
—New York Life Ins. Co. v. Allison, 107 Fed. 179....46 C. C. A. 229

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Large mirrors placed around the walls of a room used for public purposes when the building was constructed, forming panels finished in harmony with the remainder of the room, and which cannot be removed without leaving the room dismantled and unfinished in appearance, are a part of the building.
—New York Life Ins. Co. v. Allison, 107 Fed. 179....46 C. C. A. 229

Where a building was piped for lighting with gas, and also equipped with an electric lighting system, prepared for connection with the street supply, dynamos and engines for driving the same, installed in the building from considerations of economy only, and not from necessity, which were used for no other purpose than to supply electricity for use in the building, and which could be removed without difficulty or injury to themselves or the building, and were susceptible of use either singly or together in any other building, did not become a part of the realty, so as to pass under a prior mortgage, as against a purchaser of such machinery from the mortgagor.
—New York Life Ins. Co. v. Allison, 107 Fed. 179....46 C. C. A. 229

Upholstered turn-over theater chairs, arranged in an auditorium in rows, in the usual manner of seating such rooms, and fastened to the floor by screws, being essential to the use for which the room is designed, are presumably intended as permanent attachments to the building, and are a part of the realty, as between mortgagor and mortgagee, unless circumstances indicating a contrary intention are shown.
—New York Life Ins. Co. v. Allison, 107 Fed. 179....46 C. C. A. 229

FOG.

Collision of vessels, see "Collision," § 4.

FORECLOSURE.

Of mortgage, see "Mortgages," § 2.
Of street railroad mortgage, see "Street Railroads," § 1.

FOREIGN CORPORATIONS.

See "Building and Loan Associations."

FORMER ADJUDICATION.

See "Judgment," § 2.

FORMS OF ACTION.

See "Trover and Conversion."

FRAUD.

See "Fraudulent Conveyances."
Effect on limitation, see "Limitation of Actions," § 2.

FRAUDS, STATUTE OF.

§ 1. **Promises to answer for debt, default, or miscarriage of another.**
It is not essential to the validity of a promise to pay, which is in fact an original promise, based on a consideration of benefit to the promisor, although the payment will incidentally discharge the debt of another,

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that the promisee should have knowledge of the real consideration when the promise is made and acted upon.
—Choate v. Hoogstratt, 105 Fed. 713.....46 C. C. A. 174

Plaintiffs had manufactured a quantity of lumber for a lumber company, a portion of which still remained in their possession. A part of the price of such portion had been paid, and, the remainder being past due, plaintiffs refused to make any further deliveries to the company for shipment until it was paid. Defendant, who was president of a corporation which held an unrecorded mortgage on the lumber, given by the company, and also a member of a firm which was indorser on notes of the company, stated to plaintiffs orally that, if they would deliver the lumber, he would "go good" for what the company was shipping until he gave them further notice. *Held*, that under the Wisconsin rule that, "where the party promising has for his object some benefit and advantage accruing to himself, and on that consideration makes the promise," a finding by the jury, under instructions properly stating such rule, that defendant's promise was an original promise, which bound him to payment of the value of the lumber delivered in reliance thereon, would not be disturbed.
—Choate v. Hoogstratt, 105 Fed. 713.....46 C. C. A. 174

§ 2. **Requisites and sufficiency of writing.**
A letter written by defendant to plaintiffs, in which he agreed to become responsible for the payment of a sum due plaintiffs on certain lumber sold by them to a third party if plaintiffs would deliver such lumber to the purchaser to enable him to fill his contracts, expresses a sufficient consideration to take it out of the statute of frauds of Wisconsin, which requires the writing to express a consideration.
—Choate v. Hoogstratt, 105 Fed. 713.....46 C. C. A. 174

FRAUDULENT CONVEYANCES.

§ 1. **Transfers and transactions invalid.**
Where a deed to a homestead conveyed 20 acres in addition to the amount which was exempt, which was inadvertently included, the rule that a deed fraudulent in part as against the grantor's creditors is fraudulent in toto did not apply, since such rule is not applicable to an excess of a few acres inadvertently included.
—Thompson v. McConnell, 107 Fed. 33.....46 C. C. A. 124

A rural homestead of an insolvent, being exempt from execution by positive statute (Rev. St. Tex. 1895, art. 2396), cannot be the subject of a fraudulent conveyance as against the grantor's creditors.
—Thompson v. McConnell, 107 Fed. 33.....46 C. C. A. 124

Tex. Rev. St. art. 2396, provides that a rural homestead of a debtor to the extent of 200 acres shall be exempt from sale on execution. *Held*, that the fact that a deed of an insolvent homestead calling for only 200 acres in fact conveyed 220 acres did not render the conveyance void as against the husband's creditors, where it appeared that neither the husband nor wife had actual knowledge of the exact amount of land included, and the first knowledge of the excess arose from a survey made after suit was brought.
—Thompson v. McConnell, 107 Fed. 33.....46 C. C. A. 124

GAMING.

See "Lotteries."

GOOD FAITH.

Of purchaser, see "Bills and Notes," § 1.

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GRANTS.

Of public lands, see "Public Lands."

GUARANTY.

See "Principal and Surety."
Requirements of statute of frauds, see "Frauds, Statute of," § 1.

HARMLESS ERROR.

In civil actions, see "Appeal and Error," § 7.

HEIRS.

See "Descent and Distribution."

HIGHWAYS.

See "Bridges"; "Municipal Corporations," § 2.

HOMESTEAD.

§ 1. **Transfer or incumbrance.**
Tex. Const. art. 16, § 50, and Tex. Rev. St. 1895, art. 636, requiring the wife to consent to and join in a conveyance of a homestead, and articles 635, 4618, requiring an acknowledgment by her on privy examination, did not preclude a husband from conveying the homestead directly to his wife, since, as she is not required to join in such conveyance, the statutes enacted for her protection and benefit have no application.
—Thompson v. McConnell, 107 Fed. 33.....46 C. C. A. 124

§ 2. **Abandonment, waiver, or forfeiture.**
Where an insolvent conveys the homestead to his wife, and she thereafter contracted to convey the land to B. in exchange for cattle, but, though the cattle were delivered, and possession of the homestead given, the sale was not completed, but was subsequently rescinded, such attempted sale did not show an attempt to abandon the homestead, and thus raise a presumption of fraud in the disposition of the homestead as against the husband's creditors.
—Thompson v. McConnell, 107 Fed. 33.....46 C. C. A. 124

HUSBAND AND WIFE.

§ 1. **Actions.**
Rev. St. Ill. c. 68, § 15, provides that the expenses of the family shall be chargeable on the property of both husband and wife, or either of them, in favor of creditors therefor, and in relation thereto they may be sued jointly or separately. A house was rented to defendant under a written lease signed by defendant, and the premises were occupied as a dwelling by defendant and wife. *Held*, that the contention that an action could be maintained only on the lease, and against defendant alone, because the instrument was in writing and signed by defendant, and not as an action for use and occupation, under the statute, against defendant and wife, cannot be sustained, since the statutory action was not merely remedial, but created a liability against the husband and wife, independent of any relation of landlord and tenant.
—Walker v. Houghteling, 107 Fed. 619.....46 C. C. A. 512

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IMPLIED CONTRACTS.

See "Use and Occupation."
Of cities, see "Municipal Corporations," § 1.

IMPORTS.

Duties, see "Customs Duties."

INCORPORATION.

See "Corporations," § 1.

INDEMNITY.

See "Principal and Surety."

INDICTMENT AND INFORMATION.

Offenses against bankrupt laws, see "Bankruptcy," § 5.
Offenses against postal laws, see "Post Office," § 2.

INDORSEMENT.

Of bill of exchange or promissory note, see "Bills and Notes," § 1.

INFRINGEMENT.

Of patent, see "Patents," § 4.
Of trade-mark, see "Trade-Marks and Trade-Names," § 1.

INHERITANCE.

See "Descent and Distribution."

INJUNCTION.

Appellate jurisdiction of circuit court of appeals, see "Courts," § 1.
Restraining collection of tax, see "Taxation," § 2.
Restraining unfair competition in trade, see "Trade-Marks and Trade-Names."

§ 1. Actions for injunctions.

Complainants alleged that they conveyed certain land to defendant corporation upon a covenant that it should be used exclusively as a campus for a university, being induced thereto by representations made by defendant's representatives as to the great benefit which would accrue from the location and maintenance of the university there to the owners of property in the vicinity. They further alleged that defendant or its lessee was proceeding to erect derricks and other structures on the land for the purpose of drilling for oil thereon, and converting it into an oil field, in violation of such covenant, and thereby preventing its use as a campus, and they prayed for an injunction restraining defendant from making such use of the land. *Held*, that in the absence of any allegation that complainants were, at the time of filing their bill, the owners of any property in the vicinity which could be injuriously affected, it did not

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appear that they retained any interest in the covenant which entitled them to maintain the suit.
—Los Angeles University v. Swarth, 107 Fed. 798....46 C. C. A. 647

IN PAIS.

Estoppel, see "Estoppel," § 1.

INSANE PERSONS.

Residence of curator for purpose of federal jurisdiction, see "Courts," § 1.

INSOLVENCY.

See "Bankruptcy."

INSTRUCTIONS.

In civil actions, see "Trial," § 4.
In criminal prosecutions, see "Criminal Law," § 2.

INSURANCE.

Validity of act imposing penalty on insurance companies for failure to pay losses promptly as taking property without due process of law and denying equal protection of laws, see "Constitutional Law," § 1.

§ 1. **Control and regulation in general.**
Where an insurance association in fact does business in a state by soliciting members and issuing policies therein, its contracts so made are governed by the laws of the state, regardless of whether or not it applied for the privilege of doing business therein as required by the statute.
—Corley v. Travelers' Protective Ass'n, 105 Fed. 854.....
46 C. C. A. 278

§ 2. **Insurable interest.**
A life insurance policy may be taken out for the benefit of a brother of the insured, and it is immaterial what arrangements are made between them for the payment of premiums.
—Fidelity Mut. Life Ass'n v. Jeffords, 107 Fed. 402...46 C. C. A. 377

§ 3. **The contract in general.**
Ky. St. § 679, relating to life insurance, provides that "all policies or certificates hereafter issued to persons within the commonwealth by corporations transacting business therein under this law" which contain any reference to the application or constitution or by-laws of the corporation as part of the contract shall have attached a copy of such application or the provisions of the constitution or by-laws referred to, otherwise such provisions shall not be received in evidence or be considered as a part of the contract. An accident insurance association, having its national headquarters in another state, was composed of divisions and local posts; and one of such divisions, having subordinate posts, was located in Kentucky. Benefits were paid through the posts, which also received applications for membership and dues, and forwarded them to the division, which passed upon the eligibility of the applicant, subject to approval by the national office. Certificates were issued by the national secretary and sent to the division, through which they were received by the members. *Held*, that such association was transacting business in the state of Kentucky, within the meaning of the statute, and a certificate so issued and delivered therein to a person residing in the state was subject to its provisions.
—Corley v. Travelers' Protective Ass'n, 105 Fed. 854.....
46 C. C. A. 278

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Under the provision of Ky. St. § 679, requiring all policies or certificates issued to persons within the state by any corporation transacting business therein to have attached thereto a copy of any provision of the constitution or by-laws of the corporation referred to therein, or which is made a part of the contract, where such a corporation issued a certificate to a member which entitled him "to all the benefits accruing from such membership under the provisions of the constitution and by-laws of their association, * * * which are made a part of this certificate," the benefits in case of the death of the member to be paid to a beneficiary named, but no copy of any part of the constitution or by-laws was attached, the association cannot plead in bar of an action by the beneficiary after the death of the member a special limitation of six months contained in the constitution, but which was not shown by the certificate.

—Corley v. Travelers' Protective Ass'n, 105 Fed. 854..... 46 C. C. A. 278

In such case, however, the constitution may be looked to for the purpose of ascertaining the amount of the benefits recoverable, since the provision fixing such amount adds no new element to the contract, and the association will not be permitted to avoid the contract by its own wrong, in failing to comply with the statute.

—Corley v. Travelers' Protective Ass'n, 105 Fed. 854..... 46 C. C. A. 278

A contract of life insurance, made and delivered and the premiums paid in the state where insured resided, is a contract of that state and governed by its laws.

—Fidelity Mut. Life Ass'n v. Jeffords, 107 Fed. 402...46 C. C. A. 377

A provision of a policy of life insurance clearly stating that, although delivered, it should not take effect until the first premium had been paid, is valid and enforceable, at least to the extent of requiring that the holder should have paid, or obligated himself to pay, the first premium in full before the policy would attach.

—Mutual Reserve Fund Life Ass'n v. Simmons, 107 Fed. 418..... 46 C. C. A. 393

A policy of life insurance contained a provision that possession of it by the insured should not render it valid unless premium thereon had actually been paid in cash. Such policy was issued on an application made through an agent of the company who was allowed by custom to retain his commission from the first premium. The agent delivered the policy to the applicant, and himself remitted to the company the portion of the first premium in excess of his commission, taking a note from the applicant for an amount equal to about two-thirds of the entire premium. The company, in the belief that the premium had been fully paid in cash, credited the same to the policy holder, but, on learning the facts after his death, and while the note was wholly unpaid, at once repudiated the transaction and refused payment of the policy. The evidence showed that it was understood between the agent and the applicant that the note of the latter covered all he should be required to pay on account of the first premium, but the agent had no authority from the company, either express or by virtue of his agency, to accept less than full payment in cash. *Held*, that aside from the question whether, under its terms, the policy would have become effective had the note been for the full amount of the premium, it did not attach in the absence of proof that the holder had either paid, or agreed to pay, in some manner, such premium in full.

—Mutual Reserve Fund Life Ass'n v. Simmons, 107 Fed. 418..... 46 C. C. A. 393

Policies were issued by defendant on plaintiff's manufacturing plant, describing it by a plan referred to confining it to buildings designated thereon by specified numbers, and to the machinery, tools, and other articles mentioned as "contained in or attached" to these buildings. Privileges allowed "additions, alterations, and repairs," which the policy was to cover. *Held*, that the "additions, alterations, and repairs" re-

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ferred to property described in the policies, which clearly excluded a separate building unconnected with the others specified therein and in course of erection at the time they were issued; and hence, in an action for its loss, the court properly refused to submit to the jury the question whether the policies were intended to cover additional buildings erected from time to time.

—Arlington Mfg. Co. v. Norwich Union Fire Ins. Co., 107 Fed. 662.... 46 C. C. A. 542

§ 4. Premiums, dues, and assessments.

It being the duty of the insurance commissioner to make requisition for an assessment on the stockholders of an insurance company, to make up the deficiency where its capital has been impaired, and, if the deficiency is not made up, to notify the attorney general to commence action for dissolution of the company (Pol. Code Cal. §§ 600, 601), there is consideration for a note given by a stockholder to satisfy an assessment made pursuant to such a requisition, though the assessment is technically defective.

—Metcalf v. Miller, 107 Fed. 223.....46 C. C. A. 248

§ 5. Avoidance of policy for misrepresentation, fraud, or breach of warranty or condition.

Answers to questions propounded in an application for life insurance, unless clearly shown by the form of the contract to have been intended by both parties to be warranties, to be strictly and literally complied with, are to be construed as representations.

—Fidelity Mut. Life Ass'n v. Jeffords, 107 Fed. 402...46 C. C. A. 377

Code Ga. 1895, § 2097, requires applications for life insurance to be made in the utmost good faith, and declares that representations are considered as covenanted to be true, and that a variation by which the nature, extent, or character of the risk is changed will void the policy. Section 2099 declares that failure to state a material fact, if not done fraudulently, does not avoid the policy, but the willful concealment thereof, enhancing the risk, will avoid it. Section 2101 avoids a policy for willful misrepresentation as to any material inquiry made. *Held*, in view of this statute, that an untrue statement by insured that he did not have consumption, or his omission to name, when requested, all physicians who examined him within a specified time, would not avoid his policy, if his answers were made in good faith, and the misstatement or omission was not willful, but due solely to his ignorance or failure to recollect, notwithstanding he distinctly certified that his answers were true, and agreed that, if any concealment or untrue statement or answer be made, the policy should be void.

—Fidelity Mut. Life Ass'n v. Jeffords, 107 Fed. 402...46 C. C. A. 377

§ 6. Risks and causes of loss.

A provision of a policy insuring against death by accident, exempting the company from liability for death from "intentional" injury inflicted by the insured or any other person, does not preclude a recovery where the insured was killed by an insane person, incapable of forming a rational intent.

—Corley v. Travelers' Protective Ass'n, 105 Fed. 854..... 46 C. C. A. 278

§ 7. Payment or discharge, contribution, and subrogation.

Rev. St. Tex. 1895, art. 3071, imposing on a "life or health insurance company" an additional liability for its failure to pay a loss within the time specified, consisting of 12 per cent. damages on its amount and attorney's fees for its collection, has no application to accident insurance companies.

—Fidelity & Casualty Co. of New York v. Dorough, 107 Fed. 389.... 46 C. C. A. 364

§ 8. Actions on policies.

Whether the death of an insured was caused or superinduced by the use of intoxicating liquors after adoption of a by-law in the association

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of which he was a member, rendering the policy invalid in respect to a death so caused, was a question of fact for the jury.
—Supreme Lodge Knights of Pythias v. Lloyd, 107 Fed. 70..... 46 C. C. A. 153

In a suit on a policy, where the defense was that the insured was not dead, but hiding, the refusal to permit the defendant to show that the insured had committed a crime in another state, for the purpose of disclosing a motive for his concealment, was not a material error.
—Connecticut Mut. Life Ins. Co. v. Hillmon, 107 Fed. 834..... 46 C. C. A. 668

A requested instruction, in an action on an insurance policy, to the effect that, if the policy was taken out in pursuance of an alleged conspiracy, plaintiff could not recover, though her husband was in fact accidentally killed as claimed, was properly refused, when no such defense was pleaded.
—Connecticut Mut. Life Ins. Co. v. Hillmon, 107 Fed. 834..... 46 C. C. A. 668

In an action on an insurance policy, defended on the ground that assured was not dead, evidence of a conspiracy between assured and others was admissible only for the purpose of strengthening the probability that assured was not dead.
—Connecticut Mut. Life Ins. Co. v. Hillmon, 107 Fed. 834..... 46 C. C. A. 668

§ 9. Mutual benefit insurance.
An association having a membership of traveling men issued certificates to its members which entitled them to benefits in case of death or injury from accident; the same being paid from a fund created primarily by the membership fees and annual dues, but for which assessments were to be made if required. There was a central or national organization, with state divisions and local posts, although members were received through the divisions where there was no post. The benefit or indemnity feature seemed to be the principal purpose of the association, and the annual dues were divided between the post, if any, the division, the central association, and the indemnity fund. *Held*, that such association was not a secret or fraternal organization under the supervision of a grand or supreme body, and whose members were received "through the lodge system exclusively," within the meaning of Ky. St. § 641, but was an insurance organization on the co-operative or assessment plan, as defined in sections 664, 665, and subject to the provisions applicable to such associations.
—Corley v. Travelers' Protective Ass'n, 105 Fed. 854..... 46 C. C. A. 278

INTEREST.

Insurable interest, see "Insurance," § 2.

INTERIOR DEPARTMENT.

See "Public Lands," § 1.

INTERNAL REVENUE.

A stockbroker by his course of business entered into agreements with his customers to buy or sell stocks at a fixed price for future delivery. Each of such agreements was evidenced by a written memorandum properly stamped in accordance with Schedule A of the war revenue act of 1898, which enumerates, as subject to stamp taxes imposed by the act, "all sales or agreements to sell or memoranda of sales or deliveries or transfers" of stock. The transactions were purely speculative, conduct-

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ed on margins, and no actual delivery of stocks was contemplated by the parties, but settlement was made by the payment of differences and the surrender of the written memoranda. *Held*, that such settlements did not involve agreements for a resale of the stocks, requiring new memoranda to be made and stamped under such provision; the courts having no authority to infer such agreements, contrary to the fact, for the purpose of extending the provisions of the statute to transactions not within its terms.
—McClain v. Fleshman, 106 Fed. 880.....46 C. C. A. 15

Where a person fails to make and deliver bills or memoranda of agreements made by him to sell stocks and affix stamps thereto as required by section 25 of the war revenue act of 1898, a collector has no authority to demand and collect from him the value of the stamps which would have been required had he complied with the law,—the only remedy provided for a violation being by prosecution and fine or imprisonment; and a payment so enforced by a collector under threat of suit is illegally exacted, and may be recovered back.
—McClain v. Fleshman, 106 Fed. 880.....46 C. C. A. 15

Defendant, a wholesale liquor dealer in San Francisco, maintained a branch house in Portland, bearing his sign, and where presumably samples of his trade were kept, and where the public were invited to purchase. The manager thereof was a "salesman" who was required to sell judiciously, the right to cancel his contracts being reserved to his principal, who filled all orders, and, without prepaying the freight, delivered the goods to a carrier at San Francisco, consigned to purchasers in various parts of the agent's territory. *Held*, that the sales were made wholly at San Francisco, notwithstanding the agent may have been authorized to make binding contracts and collected the purchase money, and defendant was not subject, under Rev. St. § 3244, subd. 4, to the internal revenue tax, as an Oregon liquor dealer, though his method of transacting business may have been devised purposely to evade such tax.
—United States v. Chevallier, 107 Fed. 434.....46 C. C. A. 402

Under the regulations of the treasury department permitting a passenger entering the United States to bring in free of duty, as personal effects, not exceeding 50 cigars, Mexican cigars so brought into this country by passengers or travelers are not subject to internal revenue tax; and one to whom such cigars have been given may retain the same in his possession unstamped, or may give them away, without being subject to the penalty imposed by Rev. St. § 3397, on every person "who buys, receives or has in his possession any cigars on which the tax to which they are liable has not been paid."
—Nichols v. United States, 106 Fed. 672.....46 C. C. A. 405

INTERSTATE COMMERCE.

Regulation, see "Commerce."

INTESTACY.

See "Descent and Distribution."

INVENTION.

See "Patents."

JUDGES.

See "Courts."
Incapacity as ground for new trial, see "New Trial," § 1.

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JUDGMENT.

Decisions of land department, see "Public Lands," § 1.
Effect of default by principal as evidence of liability of surety, see "Principal and Surety," § 3.
Foreclosure, see "Mortgages," § 2.
In criminal prosecutions, see "Criminal Law," § 3.
Review, see "Appeal and Error."

§ 1. Opening or vacating.

Judgments at law cannot be vacated or substantially modified by the courts which rendered them subsequent to the expiration of the terms at which they were entered, in the absence of motions or proceedings for that purpose during such terms; and the only exceptions to this rule are that clerical mistakes, and such mistakes of fact not put in issue or passed upon as may be corrected by writ of error coram vobis, or by motion in lieu of that writ, and mistakes in the dismissal of a cause, may be corrected after the expiration of the terms.

—City of Manning v. German Ins. Co., 107 Fed. 52..46 C. C. A. 144

§ 2. Merger and bar of causes of action and defenses.

A petition in intervention was filed in a railroad foreclosure suit setting up a claim for rental of terminal property against the defendant accruing prior to the appointment of receivers in the suit, on account of which the intervener claimed a statutory landlord's lien, and also that its claim constituted a preferential debt in equity entitled to priority over the debt of the mortgagee as a part of the necessary expenses of operating the road. Issue was joined on both such claims, and on a hearing the petition was dismissed on the merits, and the decree of dismissal was affirmed on appeal. Subsequently, the receiver having accumulated a fund in the registry of the court from the earnings of the road, the intervener filed an amended petition asserting its equitable right to preferential payment from such fund. *Held*, that the former decree was conclusive against its right to maintain such petition, the claim made, as well as the right in which it was asserted, in the two petitions being identical, and one which, had it been sustained in the first proceeding, would have been a charge upon the same fund when subsequently earned.

—Manhattan Trust Co. v. Trust Co. of North America, 107 Fed. 328 .....46 C. C. A. 322

A contract with a bridge company gave railroad companies the right to use the bridge in perpetuity on their agreement to pay certain monthly tolls, and to pay each one-fourth of the deficiency for every period of six months in which the tolls for freight traffic fell below $40,000. The bridge company, however, was not to contract with any other person or company at a less rate than was therein provided for without the consent of the railroad companies. Under this contract suits were brought by the bridge company for deficiencies in tolls, and the decrees therein determined that reduced rates then charged by the bridge company constituted no defense, and that charges then made for counsel fees were also proper. *Held*, that the decrees were not conclusive as to the rights in the same respects, of the same defendants, in a subsequent suit by the bridge company on the same contract, for deficiencies covering a distinct period of time, within which the facts determinative of the attitude and rights of the parties may or may not have been the same.

—Pittsburgh, C., C. & St. L. Ry. Co. v. Keokuk & H. Bridge Co., 107 Fed. 781 .....46 C. C. A. 639

§ 3. Conclusiveness of adjudication.

A creditor who indemnifies an officer against damages for seizing and converting property, and defends an action against the officer individually for the conversion, is estopped by the judgment against him from

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again litigating with the plaintiffs in that action the issues there decided.
—Tootle v. Coleman, 107 Fed. 41.....46 C. C. A. 132

One who instigates another to do a wrongful action, and, when the wrongdoer is sued, takes upon himself and conducts the defense of the case, is estopped from again litigating with the plaintiff in that action the issues there decided.
—Tootle v. Coleman, 107 Fed. 41.....46 C. C. A. 132

A decree on the merits is conclusive upon all the issues joined by the pleadings, and its effect as a prior adjudication is not changed by the fact that one of such issues was not discussed in the opinion of the court.
—Manhattan Trust Co. v. Trust Co. of North America, 107 Fed. 328 .....46 C. C. A. 322

In an action between the same parties or those in privity with them upon the same claim or demand, a decision upon the merits is conclusive not only as to every matter offered, but as to every admissible matter which might have been offered, to sustain or defeat the claim or demand. But in a case in which the second litigation is upon a different claim or demand the prior judgment is an estoppel as to those matters in issue or points in controversy which were actually litigated and decided, and upon which the finding or judgment was based.
—James v. Germania Iron Co., 107 Fed. 597; Belden v. Midway Co., Id. .....46 C. C. A. 476

A party who institutes and conducts a litigation in another's name is as conclusively estopped by the decision and judgment therein from again litigating the same issues with his adversary as is the party in whose name he carries on the contest.
—James v. Germania Iron Co., 107 Fed. 597; Belden v. Midway Co., Id. .....46 C. C. A. 476

JUDICIAL SALES.

Of property of decedent, see "Executors and Administrators," § 2.

JURISDICTION.

Particular courts, see "Courts."
Submission of question of jurisdiction to jury as separate issue, see "Trial," § 1.

JURY.

Instructions in civil actions, see "Trial," § 4.
Instructions in criminal prosecutions, see "Criminal Law," § 2.
Questions for jury in civil actions, see "Trial," § 3.
Taking case or question from jury at trial, see "Trial," § 3.

§ 1. Competency of jurors, challenges, and objections.
Where two actions by the same plaintiff have been consolidated, she was entitled to as many peremptory challenges as if the actions had been tried separately; the same rule also holding good as to the defendants therein, each of which was entitled to three challenges.
—Connecticut Mut. Life Ins. Co. v. Hillmon, 107 Fed. 834..... 46 C. C. A. 668

LANDLORD AND TENANT.

See "Use and Occupation."

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LANDS.

See "Public Lands."

LAW OF THE CASE.

Decision on appeal, see "Appeal and Error," § 7.

LETTERS PATENT.

For inventions, see "Patents."

LIBEL AND SLANDER.

§ 1. Words and acts actionable, and liability therefor.

That a defendant corporation's answer in an action for libel reiterated, in substance, the defamation, was sufficient to sustain a finding of subsequent ratification of the publication, which would warrant the jury in considering the circumstances under which it was published, and holding it equally liable for any recklessness or wantonness in the publication as if it had originally authorized it.

—Tribune Ass'n v. Follwell, 107 Fed. 646.....46 C. C. A. 526

§ 2. Actions.

That a part of a libelous story discreditable to plaintiff was suppressed is no excuse for defendant when sued for publishing the rest of it.

—Tribune Ass'n v. Follwell, 107 Fed. 646.....46 C. C. A. 526

Evidence that plaintiff had never demanded a retraction of such association was irrelevant.

—Tribune Ass'n v. Follwell, 107 Fed. 646.....46 C. C. A. 526

Evidence of how many newspapers composed a press association from which defendant indirectly received a libelous dispatch which it published, where they were located, and to what ones the dispatch was sent, was irrelevant, there being no suggestion that defendant was one of them.

—Tribune Ass'n v. Follwell, 107 Fed. 646.....46 C. C. A. 526

Evidence that, prior to the date of a libelous dispatch published by defendant, none of the dispatches sent out during a witness' administration of a press association, of which he was superintendent, and from which the dispatch in question was indirectly sent to defendant, had been the basis of a libel, was properly excluded as immaterial and irrelevant.

—Tribune Ass'n v. Follwell, 107 Fed. 646.....46 C. C. A. 526

By plaintiff's waiver of so much of a libel sued for as charged his incompetency, defendant stood fully justified as to that part of the libel, and evidence to show incompetency was properly excluded.

—Tribune Ass'n v. Follwell, 107 Fed. 646.....46 C. C. A. 526

It is no defense to a libel that plaintiff has been guilty of offenses other than those imputed to him, or of offenses of a similar character, and such facts are incompetent in mitigation of damages, their only tendency being to show, not that plaintiff's reputation was bad, but that it ought to be bad.

—Tribune Ass'n v. Follwell, 107 Fed. 646.....46 C. C. A. 526

An instruction stated that "the defendant was not guilty of personal ill-will to the plaintiff, for it did not and had not previously heard of him, but it is said that its conduct in publishing the libel without mitigation and without an attempt to discover whether it was true or false was

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wanton and reckless, and is equivalent to actual malice." *Held*, that an exception to such passage was without merit.

—Tribune Ass'n v. Follwell, 107 Fed. 646.....46 C. C. A. 526

A charge stated that in one of the paragraphs of the answer defendant averred that each one of the defamatory statements in the publication complained of was and is true in substance, and that it had assumed responsibility for the libel. *Held*, that it could not complain thereof, as its answer avers that "each and every defamatory statement in the publication is and was true, in substance, as follows," and then sets forth several instances in which it alleged that plaintiff charged for and collected more money from his employer than he actually disbursed.

—Tribune Ass'n v. Follwell, 107 Fed. 646.....46 C. C. A. 526

LIENS.

See "Maritime Liens."

Effect of proceedings in bankruptcy, see "Bankruptcy," § 1.

Mortgage, see "Chattel Mortgages," § 1.

On street railroads, see "Street Railroads," § 1.

LIFE INSURANCE.

See "Insurance," § 5.

LIMITATION.

Of claim of patent, see "Patents," § 3.

LIMITATION OF ACTIONS.

See "Trespass to Try Title," § 1.

Action on bond of postmaster, see "Post Office," § 1.

§ 1. Statutes of limitation.

Where a railroad mortgage executed to a trustee contained no express covenant on the part of the trustee, one cannot be implied, unless clearly growing out of the language or the obvious intent of the parties; and a suit by the bondholders secured, against the trustee, for its failure to properly protect their interests, is one for a breach of duty implied by law, and not for a breach of covenant, for the purposes of determining the statute of limitations applicable to such suit.

—Frishmuth v. Farmers' Loan & Trust Co., 107 Fed. 169; Antelo v. Same, Id.....46 C. C. A. 222

Rev. St. Tex. arts. 3354–3356, provide that there shall be commenced and prosecuted, within two years after the cause of action accrues, and not afterwards, all actions for debts not evidenced by contracts in writing, and a longer time is fixed for debts founded on written contracts. *Held*, that the charter of a city railroad company, which authorized it to construct and operate its lines under such conditions and ordinances as the city might provide and impose, was not a contract in writing within such statute, on which a special assessment against the company for a street improvement, subsequently authorized by the legislature, was founded, as the contract mentioned by the statute is a contract between the parties, and the city was not a party to the company's charter, which was solely between the latter and the state, and hence the two-years limitations applied to actions for such assessments.

—City of Galveston v. Guaranty Trust Co. of New York, 107 Fed. 325 .....46 C. C. A. 319

Rev. St. Mo. 1899, § 4262, which limits the time within which an action may be brought for the recovery of lands or tenements to 10 years, and

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which, under the decisions of the state courts, applies to all suits, whether legal or equitable in their nature, may be invoked by a purchaser in possession under a deed executed upon a foreclosure sale against a suit by the mortgagor to redeem, where the possession of the defendant was adverse to the complainant.
—Stout v. Rigney, 107 Fed. 545.....46 C. C. A. 459

§ 2. Computation of period of limitation.
A railroad company executed and delivered to a trustee bonds, and a mortgage securing the same, upon property yet to be acquired and constructed; the mortgage providing that the bonds should be certified and issued by the trustee from time to time on request of the company, the proceeds to be retained by the trustee, and paid out only on the orders of the company, stating the purpose for which such proceeds were to be used, or that the bonds should be delivered to the company on the like statement; the company covenanting that the bonds or their proceeds should be used only for the purposes contemplated by the mortgage. Holders of the bonds filed a bill against the trustee for relief on the ground that it had certified and issued the bonds without the statements required, and which did not have the security contemplated by the mortgage, by reason of which fact they proved to be worthless. A demurrer to the bill was sustained on the ground that the suit was barred by limitations. *Held*, that the gravamen of the bill was a breach of trust on the part of defendant, and that its nature was not changed by amendments merely adding an allegation that the action of the defendant was fraudulent, so as to convert it into a bill for fraud, against which limitations would not begin to run until the fraud was discovered by complainants.
—Frishmuth v. Farmers' Loan & Trust Co., 107 Fed. 169; Antelo v. Same, Id.....46 C. C. A. 222

One who enters upon land under a trustee's deed which purports to convey an absolute title, and which was executed upon a sale by the trustee in a mortgage, the purpose of which was to bar the mortgagor's equity of redemption, must be regarded as holding adversely to the mortgagor from the time his deed is recorded, and possession is taken thereunder, although the sale made by the trustee was irregular or premature; and no actual notice to the mortgagor of the adverse nature of his claim is necessary to invoke the running of the statute of limitations for its protection.
—Stout v. Rigney, 107 Fed. 545.....46 C. C. A. 459

§ 3. Acknowledgment, new promise, and part payment.
A debtor, in writing to his creditors, wrote of "my indebtedness to you," asked for a statement of what he "now" owed, "estimated" his indebtedness to one of them at more than it really was, and asked for statements from them of their figures, that he might compare with his own. There was nothing in his letters to "repel the presumption" of a promise to pay what he admitted he owed, and nothing inconsistent with such an inference from his admission. *Held* sufficient acknowledgment in writing, within Code Civ. Proc. N. Y. § 395, to take the debts in question out of the operation of the statute.
—In re Lorillard, 107 Fed. 677.....46 C. C. A. 553

LIMITATION OF LIABILITY.

Of owner of vessel, see "Shipping," §§ 2, 4.

LITERARY PROPERTY.

See "Copyrights."

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LOAN COMPANIES.

See "Building and Loan Associations."

LOTTERIES.

§ 1. **Criminal responsibility.**
Act March 2, 1895, providing that "any person who shall cause to be brought within the United States from abroad, for the purpose of disposing of the same, or deposited in or carried by the mails of the United States, or carried from one state to another in the United States, any paper, certificate, or instrument purporting to be or represent a ticket, chance, share, or interest in or dependent upon the event of a lottery," etc., defines three separate and distinct offenses; and to constitute an offense under either the second or third clause it is not necessary that the paper, certificate, or instrument should have been brought into the United States from abroad for the purpose of disposing of the same, those being the elements of the first offense alone.
—Reilley v. United States, 106 Fed. 896.....46 C. C. A. 25

MARITIME LIENS.

§ 1. **Creation, operation, and effect.**
One making repairs on a vessel in a foreign port upon the order of a supposed resident corporation, which claimed to be the owner, but was in fact a charterer without authority under its charter to incumber the vessel, cannot claim a lien for such repairs unless there is affirmative evidence showing that the credit of the ship was pledged; and, where no formal contract was made, his bare statement that the work was done on the credit of the ship is not, alone, sufficient to establish such pledge.
—The Roanoke, 107 Fed. 743.....46 C. C. A. 618

MARRIAGE.

See "Husband and Wife."

MASTER AND SERVANT.

§ 1. **The relation.**
The making of an improvident contract by an electrical engineer with his assistants, which is corrected, at his employer's request, as soon as made, does not, as matter of law, justify his discharge, but is to be considered on the question of his alleged misconduct in acting against the employer's pecuniary interest and in failing to render faithful service.
—New York Insulated Wire Co. v. Broadnax, 107 Fed. 634.....
46 C. C. A. 518

§ 2. **Master's liability for injuries to servant.**
A railroad company which is constructing new switches does not owe the duty to a brakeman of blocking a frog, which is a part of the new construction, during progress of the work; it being impracticable to block it till the tracks are ballasted and the alignment of the rails of the frog is perfected. Giving him such notice and warning as will put him on his guard against the dangers from use of the track while the work is in progress is enough.
—Hauss v. Lake Erie & W. R. Co., 105 Fed. 733.....46 C. C. A. 94

Notice to a brakeman that digging is being done between the ties at a certain place, with warning that he look out for it and avoid injury, is sufficient, without mentioning the danger from the unblocked frogs,

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especially where the work has been for two weeks within his daily view and observation while passing on his train.
—Hauss v. Lake Erie & W. R. Co., 105 Fed. 733.....46 C. C. A. 94

The Mexican railroad law, declaring (article 184) that "railway companies are liable for all faults or accidents which occur through the tardiness, negligence, imprudence, or want of capacity of their employés," makes a company liable for an injury to an employé resulting either solely from its own negligence, or from its own negligence concurring with that of fellow servants.
—Mexican Cent. Ry. Co. v. Glover, 107 Fed. 356.....46 C. C. A. 334

Plaintiff, a fireman on a north-bound train, was injured in jumping from his engine to avoid being involved in a collision with a south-bound train standing on the main track at a blind siding, where the trains had been ordered to meet. The night was dark, and the engine in front of him was without headlight or signal lamps, and the wind was blowing sand and snow across the track. The siding was without a telegraph station or a signal house by which it could be recognized, and it was a fair inference from the evidence that there was no signal light at the meeting point. *Held*, that the negligence causing the collision was attributable to the company, in ordering the trains to meet at such place, though it concurred with negligence on the part of plaintiff's fellow servants, the conductor and engineer of the south-bound train, in operating it without lights.
—Mexican Cent. Ry. Co. v. Glover, 107 Fed. 356.....46 C. C. A. 334

A petition for injuries to a fireman alleged that "he was greatly, seriously, and permanently injured on his head, eye, right shoulder, hand, side, leg, hips, back, and spine, and was seriously and permanently injured for life," and that "as a result of his injuries he has become weak, inefficient, and incapacitated in his business of railroading, in which he is skilled." *Held* to warrant evidence of vomiting and hemorrhages which followed soon after the injuries complained of.
—Mexican Cent. Ry. Co. v. Glover, 107 Fed. 356.....46 C. C. A. 334

Where the uncontradicted facts establish the negligence of the company and its agents in causing an injury to a fireman, and his right to recover damages therefor, no error can be predicated on a peremptory instruction in his favor.
—Mexican Cent. Ry. Co. v. Glover, 107 Fed. 356.....46 C. C. A. 334

A brakeman was set to work in switching with a road engine regularly used for that purpose, but unprovided with any special hand hold in front, necessary in his work. No particular projection was used, and the use of any particular one was not forbidden. The brakeman, however, used the figure plate, which was adapted thereto, and most convenient for a man of his size. It had been loose for 24 hours, but was apparently all right when he took hold of it. It gave way, however, and he was thrown under the cowcatcher and injured. *Held*, that the company owed him the duty of inspecting the plate commensurate with the purpose for which it must be assumed that it knew it was used, and hence, on proof of the foregoing facts, it was error to nonsuit him in an action for damages, enough being shown to require some proof of inspection to overcome the presumption of negligence.
—Dunn v. New York, N. H. & H. R. Co., 107 Fed. 666.....
46 C. C. A. 546

§ 3. **Liabilities for injuries to third persons.**

Libelant contracted to carry a cargo of coal on his canal boat, and deliver the same to respondent, as consignee, and to tend the guy while the cargo was being discharged by respondent. While holding the guy rope in the performance of such duty, it came untied from the chain to which it was fastened, and in consequence libelant fell and was injured. The rope had been tied in the morning by an employé of respondent, but the knot was examined by libelant, who was competent to judge of its sufficiency, and he testified that it was sufficient and could not have come

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untied. *Held*, that he assumed the risk of its sufficiency, and could not recover on the ground of the negligence of respondent's servants; the preponderance of evidence showing that none of such servants had disturbed the knot since it was first tied.
—Farrell v. Continental Iron Works, 106 Fed. 987....46 C. C. A. 75

MEMORANDA.

Required by statute of frauds, see "Frauds, Statute of," § 2.

MERGER.

Of cause of action in judgment, see "Judgment," § 2.

MISREPRESENTATION.

By insured, see "Insurance," § 5.

MORTGAGES.

Effect of proceedings in bankruptcy, see "Bankruptcy," § 1.
Personal property, see "Chattel Mortgages."
Railroads, see "Railroads," § 1; "Street Railroads," § 1.

§ 1. **Requisites and validity.**
The date of acknowledgment of a mortgage differing from the date of the mortgage, the mortgage, in the absence of any evidence on the subject, will be held to have been delivered when it purports to be acknowledged.
—Guaranty Trust Co. of New York v. Galveston City R. Co., 107 Fed. 311; Same v. City of Galveston, Id.....46 C. C. A. 305

§ 2. **Foreclosure by action.**
A court of equity, in a suit to foreclose a mortgage on the property of a water company, in which it has appointed a receiver, has no power to require a city to pay to such receiver a sum on account of alleged indebtedness to the mortgagor for water rentals, which is denied by the city and has not been adjudicated.
—City of Eau Claire v. Payson, 107 Fed. 552.....46 C. C. A. 466

MOTIONS.

Direction of verdict in civil actions, see "Trial," § 3.

MUNICIPAL CORPORATIONS.

See "Counties"; "Towns."
Rights of telegraph companies in city streets, see "Telegraphs and Telephones," § 1.
Street railroads, see "Street Railroads."
Water supply, see "Waters and Water Courses," § 1.

§ 1. **Contracts in general.**
A city, like an individual or private corporation, may bind itself by implied contracts.
—City of Austin v. Bartholomew, 107 Fed. 349; Nalle v. City of Austin, Id.....46 C. C. A. 327

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§ 2. **Use and regulation of public places, property, and works.**
The appropriation, whether by custom or ordinance, of a street adjacent to a railroad freight house to the use of teams, trucks, and wagons in loading and unloading merchandise, is a legitimate public use of the street, of such importance that a mere trespasser, seeking to interfere therewith, should receive scant favor from a court of conscience.
—General Electric Ry. Co. v. Chicago, I. & L. Ry. Co., 107 Fed. 771... 46 C. C. A. 629

§ 3. **Fiscal management, public debt, securities, and taxation.**
An act of the Ohio legislature, passed in 1893, authorizing a township to issue bonds for the purpose of refunding its then existing indebtedness, was not a law of a general nature, within the meaning of the state constitution (article 2, § 26), providing that all laws of a general nature shall have a uniform operation throughout the state, under the construction previously given such provision by the supreme court of the state; and it cannot be held invalid, as in violation of such constitutional provision, as against a bona fide purchaser of bonds issued by the township thereunder.
—Board of Trustees of Hardy Tp., Holmes County, Ohio, v. Brattleboro Savings Bank, 106 Fed. 986.....46 C. C. A. 66

An act authorizing the trustees of a township to issue bonds for the purpose of refunding its outstanding indebtedness, which contains no reference to any record of such indebtedness, or requirement that such a record shall be kept, but provides that the bonds shall contain a recital that they are issued under and by authority of such act, must be held to confer power on the trustees, who are the officers charged with the duty of incurring the indebtedness of the township, to recite in the bonds that the valid indebtedness of the township is such as to authorize their issuance under the act, in order to refund it; and such recital is conclusive on the township, in favor of a bona fide purchaser of the bonds.
—Board of Trustees of Hardy Tp., Holmes County, Ohio, v. Brattleboro Savings Bank, 106 Fed. 986.....46 C. C. A. 66

A cause of action against a city street-railroad company on a special assessment for a street improvement accrued, within the meaning of the statute of limitations, when the improvement was completed and accepted by the city council, as the city charter expressly provides that assessment for such improvements shall become due at that time.
—City of Galveston v. Guaranty Trust Co. of New York, 107 Fed. 325 .....46 C. C. A. 319

A special assessment against a street-railroad company for improving the portion of the street occupied by its track is not a tax, within Rev. St. Tex. art. 5212b, prohibiting a delinquent municipal taxpayer from pleading limitations against the payment of "any taxes" due from him to the city.
—City of Galveston v. Guaranty Trust Co. of New York, 107 Fed. 325 .....46 C. C. A. 319

Under Laws Kan. 1886, p. 123, relating to the organization of new counties, which provided that no bonds of any kind should be issued by any county organized thereunder, or by any subdivision thereof, within one year after such organization, and which was amended by Laws 1887, p. 186, so as to read that "no bonds * * * shall be voted for and issued by any county or township within one year after the organization of such new county under the provisions of this act," a township had no power to vote upon the issuance of bonds within a year after the organization of the county, and railroad aid bonds issued pursuant to a vote at an election held within a year after the organization of the county are void, although not issued until after the expiration of such year, and, where the date of the election appears upon their face, all purchasers are chargeable with notice of their invalidity.
—Sage v. Fargo Tp., 107 Fed. 383.....46 C. C. A. 361

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Municipal bonds, which were void from the beginning because of want of power in the municipality to issue them, cannot be validated by any subsequent act of ratification or estoppel.
—Sage v. Fargo Tp., 107 Fed. 388.....46 C. C. A. 361

Township bonds issued for this purpose, and the act of March 1, 1889, authorizing their issue, are beyond the powers of the legislature and the township, and are void.
—Dodge v. Mission Tp., Shawnee County, Kan., 107 Fed. 827.....
46 C. C. A. 661

MUTUAL INSURANCE.

See "Insurance," § 9.

NAMES.

See "Trade-Marks and Trade-Names."

NATIONAL BANKS.

See "Banks and Banking," § 1.

NAVIGABLE WATERS.

See "Waters and Water Courses."

NEGLIGENCE.

See "Collision."
Employers, see "Master and Servant," § 2.
Of passenger, see "Carriers," § 1.

§ 1. **Actions.**
Injury to eyesight may be proved under a complaint alleging that plaintiff was hurled forward with such force as to bruise her knee, wrench her arm, and "otherwise seriously and grievously injure her."
—Brooklyn Heights R. Co. v. MacLaury, 107 Fed. 644.....
46 C. C. A. 523

NEGOTIABLE INSTRUMENTS.

See "Bills and Notes."

NEW PROMISE.

Within statute of limitations, see "Limitation of Actions," § 3.

NEW TRIAL.

Necessity of motion for purpose of review, see "Appeal and Error," § 2.
Opening or vacating judgment, see "Judgment," § 1.
Review of discretion in granting or refusing new trial, see "Appeal and Error," § 7.

§ 1. **Grounds.**
An order for a new trial, when the application for it is made in due time, is the proper remedy for the incapacity of the judge who tried the case to settle and sign the bill of exceptions.
—City of Manning v. German Ins. Co., 107 Fed. 52..46 C. C. A. 144

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NOTES.

Promissory notes, see "Bills and Notes."

NOTICE.

To produce primary evidence, see "Evidence," § 3.

OCCUPATION.

Of real property, see "Use and Occupation."

OFFICERS.

United States officers, see "United States," § 1.

OPENING.

Judgment, see "Judgment," § 1.

OPINION EVIDENCE.

In civil actions, see "Evidence," § 7.

ORDERS.

Review of appealable orders, see "Appeal and Error."

PAROL EVIDENCE.

In civil actions, see "Evidence," § 6.

PARTIES.

On appeal or writ of error, see "Appeal and Error," § 3.

§ 1. **Defects, objections, and amendment.**
A defect of parties plaintiffs or defendants through misjoinder or nonjoinder is waived by a failure to suggest the same by demurrer or answer.
—Tootle v. Coleman, 107 Fed. 41.....46 C. C. A. 132

PASSENGERS.

See "Carriers," § 1.

PATENTS.

For public lands, see "Public Lands," § 1.

§ 1. **Patentability.**
The Stieringer reissue No. 11,544 (original No. 294,697), for a combined gas and electric light fixture, is void for lack of patentable invention, in

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view of the prior patent to the same inventor, which covered a device for utilizing gas fixtures for electric lights with safety, the improvement on such device embodied in the later patent, by which certain of the arms of the fixture were still used for gas, while the others carried electric lights, being one which would readily occur to a mechanical electrician.

—Pelzer v. Dale Co., 106 Fed. 989.....46 C. C. A. 83

The Thomson patent, No. 283,167, for improvements in electric switches or commutators, as to claims 1 and 4, the essential feature of which is the use of a magnet to dissipate, or prevent the formation of, an arc between the separated parts of the conductor when an electric current is broken by means of a switch, for the purpose of preventing the burning of such parts, is void for lack of patentable invention. The influence of a magnet on the arc formed in a disconnected circuit was previously well known, and the result of preserving the contact points of an electric switch from injury by combining a magnet with such switch, which is the essence of the claims of the patent, is so much a part of the known result of its action that it cannot be claimed as a new discovery or render the combination patentable.

—Thomson-Houston Electric Co. v. Nassau Electric R. Co., 107 Fed. 277; Same v. Bullock Electric Co., Id.....46 C. C. A. 263

The Thomson patent, No. 401,085, for a shield designed to retain the arc formed in breaking an electric circuit, by means of a switch, within the field of a magnet, used, in combination with the switch, to rupture or dissipate such arc, and prevent the burning of the electrodes, and which, as described in claims 1 to 6 of the patent, consists in covering the poles of the magnet, or the electrodes, or both, with a coating of insulating material, such as enamel, is void for lack of patentable invention; being merely the application to a new device of well-known mechanical means of insulation to accomplish the old result of preventing the injurious escape of an electric current.

—Thomson-Houston Electric Co. v. Nassau Electric R. Co., 107 Fed. 277; Same v. Bullock Electric Co., Id.....46 C. C. A. 263

§ 2. Applications, and proceedings thereon.

A claim for a machine or for a combination of mechanical devices is not invalid or insufficient because it fails to include mechanical devices for uniting or operating the machine or combination which readily suggest themselves to a mechanic skilled in the art, or which are pointed out in the specification and drawings as means for the purpose.

—Brammer v. Schroeder, 106 Fed. 918.....46 C. C. A. 41

Drawings are a part of the specification of a patent, and for the purpose of ascertaining the sufficiency of the description of the invention must be read with it.

—Brammer v. Schroeder, 106 Fed. 918.....46 C. C. A. 41

§ 3. Construction and operation of letters patent.

The term "mechanical equivalent," when applied to the interpretation of a pioneer patent, has a broad and generous signification; but when it is applied to a slight and almost immaterial improvement in the progress of an art it has a very narrow and limited meaning, while in its application to all that great mass of inventions which falls between the two extremes its significance is proportioned to the character of the advance or invention under consideration, and is so interpreted by the courts as to protect the inventor against piracy and the public against unauthorized monopoly.

—Brammer v. Schroeder, 106 Fed. 918.....46 C. C. A. 41

The doctrine of mechanical equivalents is governed by the same rules and has the same application in a case in which the infringement of a patent for a combination is in question as in cases where the issues are over the infringement of patents for machines or compositions of matter.

—Brammer v. Schroeder, 106 Fed. 918.....46 C. C. A. 41

Wherever patentability of a device turns on the application to some particular purpose of an element used generally throughout the arts,

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although the patent issues for the device, and not for the process, product, or result, and if, also, the invention is of a limited or low order, the patent must be restricted, so far as an alleged infringement is concerned, to the express purpose pointed out by the inventor. Electric Co. v. La Rue, 11 Sup. Ct. 670, 139 U. S. 601, 35 L. Ed. 294, U. S. v. Berdan Fire-Arms Mfg. Co., 15 Sup. Ct. 420, 156 U. S. 552, 39 L. Ed. 530, and Watson v. Stevens, 2 C. C. A. 500, 51 Fed. 757, applied.

—Davey Pegging Mach. Co. v. Isaac Prouty & Co., 107 Fed. 505.... 46 C. C. A. 439

§ 4. **Infringement.**

One who invents and secures a patent for a machine or combination which first performs a useful function is protected thereby against all machines or combinations which perform the same function by equivalent mechanical devices; but one who merely makes and secures a patent for a slight improvement on an old device or combination, which performs the same function before as after the improvement, is protected against those only who use the very device or improvement he describes and claims, or colorable evasions of it.

—Brammer v. Schroeder, 106 Fed. 918.....46 C. C. A. 41

One who appropriates a new and useful patented combination cannot escape infringement by the use of mechanical devices to unite or operate the elements of the combination which differ from those which are pointed out for the purpose, but which are not claimed in the patent.

—Brammer v. Schroeder, 106 Fed. 918.....46 C. C. A. 41

Act Cong. March 3, 1897 (29 Stat. 695), defining the jurisdiction of United States circuit courts in patent cases, provides that suit may be brought in any district in which the defendant shall have committed acts of infringement and have a regular and established place of business. *Held*, that where it did not appear from an order sustaining a motion to set aside process served on a foreign corporation in an action for infringement of patent, on the ground that the place where it was served was not defendant's place of business, that defendant did not have a place of business within the district in which the suit was brought, the order vacating the service was not a final decision or decree from which an appeal would lie to the circuit court of appeals.

—L. E. Waterman Co. v. Parker Pen Co., 107 Fed. 141..... 46 C. C. A. 203

In a suit for the infringement of letters patent No. 608,720. for a collar turning and ironing machine, granted August 9, 1898, to William C. Shaw, where it appears that the patent is a recent one, and there is no such proof of long-continued acquiescence by the public as would raise a prima facie case in the patentee's favor, and there is a substantial question as to infringement, which can be settled only on construction of the patent requiring a presentation of the state of the art and a history of the invention, a preliminary injunction should not be granted without proof of a prior adjudication; and the fact that in interference proceedings in the patent office eight different applicants were involved, of whom only the patentee and one other took testimony settling the question of priority between the patentee and that other, is not such an adjudication as the practice calls for.

—Reed Mfg. Co. v. Smith & Winchester Co., 107 Fed. 719..... 46 C. C. A. 601

§ 5. **Decisions on the validity, construction, and infringement of particular patents.**

The Sanborn patent, No. 275,947, for a split wooden pulley, claim 1, is entitled to a narrow construction only, and is not infringed by a spoke pulley.

—Dodge Mfg. Co. v. Collins, 106 Fed. 935.....46 C. C. A. 53

The Brown patent, No. 300,690, for an improvement in hoisting and conveying machines, used chiefly in unloading heavy cargoes, such as coal and ore, from vessels, and conveying the same to a distance,—the im-

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provement described in the first three claims consisting in providing a jointed connection between the truss which carries the track of the conveyor and the piers upon which it is supported at or near either end, so as to permit the first end of the truss and the pier supporting it to be moved laterally without straining the parts or moving the second pier,—is void for anticipation and lack of patentable invention. The idea of making articulate connections between the truss and piers, broadly claimed as new in the patent, was disclosed in prior patents; and the specific devices described in the claims for making such connections were old and well known, and such as would readily suggest themselves to a skilled mechanic as appropriate to accomplish the object desired.

—Brown Hoisting & Conveying Mach. Co. v. King Bridge Co., 107 Fed. 498.....46 C. C. A. 432

The McNeal patent, No. 351,064, claims 1 to 6, which cover split wooden pulleys and a mode of constructing the same, show merely combinations of old and well-known devices, which produce no new result, and are void for lack of patentable invention.

—Dodge Mfg. Co. v. Collins, 106 Fed. 935.....46 C. C. A. 53

Claim No. 1 of the Osgood patent, No. 357,851, must be limited to an apparatus in which gravity does not suffice to start and carry the car to its destination, in order to save the claim from invalidity, in view of the prior art, and also because the specification states, "it is manifest that the wire must be practically horizontal," and a two-wheeled carrier is also an indispensable constituent of the claim, so that it is not infringed by a carrier having a single wheel, nor by a device in which the wire track is inclined so that the car runs thereon by gravity.

—Consolidated Store-Service Co. v. Siegel-Cooper Co., 107 Fed. 716... 46 C. C. A. 599

The Osgood patent, No. 357,851, for an improvement in a cash-car apparatus,—the device described consisting of a car rigidly suspended by two wheel hangers from a horizontal wire, along which it is moved by a push of the hand,—discloses a patentable invention, which was not anticipated, and is valid.

—Consolidated Store-Service Co. v. Siegel-Cooper Co., 107 Fed. 716... 46 C. C. A. 599

The Noyes patents, No. 359,687, for a municipal or police signal system, and No. 359,688, for a transmitting apparatus for such a system, were not anticipated by patent No. 359,686, to the same inventor, and relating to the same subject-matter, nor by anything in the prior art, and are valid. Claims 1 and 2 of the first patent also *held* infringed, and the second, as limited by the first, *held* not infringed.

—Municipal Signal Co. v. National Electrical Mfg. Co., 107 Fed. 284... 46 C. C. A. 270

The Knight patent, No. 428,169, for an electro-motor regulator, which describes a device for use on that class of electric motors in which the reverser and the regulator are operated by separate levers, and consists of an interlocking mechanism connecting the two levers which prevents the movement of either except when the other is in a predetermined position, is not for a pioneer invention, but for an improvement only, in that class of motors, and must be limited in construction to substantially the device shown. The first four claims, which by their claims cover broadly any interlocking device for co-ordinating the two levers, are void in view of the prior art, which discloses such mechanism used for interlocking of the levers for operating railroad switches and signals, and the invention of the patentee is measured by the novelty of the particular device by which he applied the same principle to the levers of an electric motor.

—Thomson-Houston Electric Co. v. Lorain Steel Co., 107 Fed. 711.... 46 C. C. A. 593

The Philion patent, No. 468,490, for an improvement in the process of constructing wooden pulleys, which consists essentially in uniting seg-

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ments to form rings, and then uniting the rings together by means of glue and pressure, is void for want of patentable novelty.
—Dodge Mfg. Co. v. Collins, 106 Fed. 935.....46 C. C. A. 53

The Goodfellow patent, No. 493,621, for a store-service apparatus, claims 1, 2, 3, 5, and 13, covering the method of propelling a carrier along a way or track by means of a flexible cord or device running along the track under the upper wheels of the carrier and over pulleys above, or over the under wheels of the carrier and under pulleys below at each end, which by being pulled over the pulleys separates itself from the way, causing the carrier to move from one end of the way to the other, were not anticipated, and are valid.
—Lamson Consol. Store-Service Co. v. Chamberlin, 106 Fed. 988..... 46 C. C. A. 79

The Moore patent, No. 524,502, for improvements in hoisting and conveying apparatus used in digging and refilling sewer trenches, while it discloses patentable invention and is valid, is limited by the prior art, as well as by the language of claim 1, to means for carrying the moving parts of the apparatus high enough to clear the lining of the trench and the heads of workmen therein, which, as described, consist of the use of a moving car or conveyor, run upon tracks laid on either side of the trench, upon which the buckets of earth are hoisted by means of a hoisting apparatus, and which is constructed "with an open base frame," having no timbers across it below the platform upon which the operator stands, and which is placed at a considerable height above the trucks. The patent is not infringed by a conveyor which lacks the element of the open base frame.
—Moore v. Eggers, 107 Fed. 491.....46 C. C. A. 425

The first claim of letters patent No. 535,465, to John Schroeder, for improvements in means for operating washing machines, is sustained.
—Brammer v. Schroeder, 106 Fed. 918.....46 C. C. A. 41

The Davey patent, No. 555,434, for an improvement in pegging machines, the essential feature of which is a reduction in size of the horn tip used in such machines to support the work during the pegging operation, so as to enable it to enter far enough into shoes having pointed or small toes to do effective work therein, while describing a machine which consists of a combination of well-known elements, discloses patentable invention, in that it accomplished successfully what prior inventions had failed to accomplish; but, so construed, it is not infringed by a machine which contains substantially the same elements, arranged to accomplish the cutting of the pegs, as well as driving them, and without regard to reduction in size of the horn tip.
—Davey Pegging Mach. Co. v. Isaac Prouty & Co., 107 Fed. 505.... 46 C. C. A. 439

Panse patent, No. 595,728, for a plaiting machine, in which the only patentable features are the peculiar shape of an undulating knife or blade, and the manner of permanentizing the shape of the fabric after it is plaited, and in which there is a vibratory motion of the knife and a step by step movement of the rolls, is not infringed by a machine which has neither of these movements, and in which the devices which produce plaits are totally different.
—Kursheedt Mfg. Co. v. Naday, 107 Fed. 488; Same v. Adler, Id.... 46 C. C. A. 422

A combination of mechanical devices described in and claimed by letters patent No. 606,044, to Henry F. Brammer, infringes the first claim of letters patent No. 535,465.
—Brammer v. Schroeder, 106 Fed. 918.....46 C. C. A. 41

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PATENTS ENUMERATED.

ENGLISH.

1869.

737. Store service apparatus .. 80

UNITED STATES.

ORIGINAL.

35,449. Spring catch 81
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PAYMENT.

See "Compromise and Settlement"; "Insurance," § 7.

§ 1. Pleading, evidence, trial, and review.

Evidence of payment is only admissible under a plea of payment which should be specific as to the amount paid. An allegation in an answer that defendant turned over to plaintiffs certain lumber, of a stated value, which was accepted in settlement and in full accord and satisfaction of another's debt, is not a plea of payment which authorizes the defendant to go into a general accounting, and to prove the value of the lumber so turned over, in order to show that the debt had been paid independently of the alleged accord and satisfaction.

—Choate v. Hoogstratt, 105 Fed. 713.....46 C. C. A. 174

PENALTIES.

Violation of copyright laws, see "Copyrights," § 1.

PERSONAL INJURIES.

See "Negligence."

Compromise of claim, see "Compromise and Settlement."

To employé, see "Master and Servant," § 2.

PLEADING.

Action for negligence, see "Negligence," § 1.

Action for personal injuries to servant, see "Master and Servant," § 2.

Action on bond of postmaster, see "Post Office," § 1.

Payment, see "Payment," § 1.

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PLEDGES.

Liability of pledgee of shares in national bank to assessment, see "Banks and Banking," § 1.

POLICY.

Of insurance, see "Insurance."

POST OFFICE.

§ 1. Post-office department, post offices, postmasters, and other officers.

A count in a petition against a postmaster's bondsmen alleged that he did not faithfully perform all the duties and obligations imposed on him and required of him by law by the rules and regulations of the department in connection with the money-order business, and had not paid moneys which came into his hands as postmaster. Thereunder certified copies of bonds, transcripts of the money orders of the department, and evidence of due demand for balances claimed as due were offered and admitted. Thereupon the government offered in evidence money orders signed, or purporting on their face to be signed, by him, on blanks furnished him, drawn on other postmasters, and paid to the payee named therein or to his assignee, and aggregating the amount of the shortage sued for. *Held*, that it was error to exclude such orders, but that it did not constitute ground for reversal, where it was conceded that proof to rebut the prima facie case established thereby was at the command of the sureties, to be offered if required.

—United States v. Norton, 107 Fed. 412.....46 C. C. A. 387

The original petition in an action on a Texas postmaster's bonds counted on his nonpayment of moneys which actually came into his hands from money orders sold, fees thereon, etc., and subsequent amended petitions counted on moneys which a third person, not a regularly authorized assistant or clerk, had fraudulently acquired by filling out blank money orders, advice forms, etc., and causing them to be paid at other post offices, the fraud being alleged to be due to his either having allowed such unauthorized person access to his supplies, or to his having failed to comply with department regulations as to their custody. *Held* that, conceding that moneys thus fraudulently acquired by a third person constituted funds in the postmaster's custody, within the meaning of the postal laws and regulations, the amended petitions stated a new and different cause of action not within the original lis pendens, and hence did not relate back to the commencement of the action pursuant to the Texas practice, and take the place of the original petition, so as to prevent limitations from running in favor of the sureties on the new cause of action alleged in the amendments.

—United States v. Norton, 107 Fed. 412.....46 C. C. A. 387

Funds in other offices on which a postmaster could draw do not constitute money-order funds in his custody, within the meaning of the postal laws and regulations.

—United States v. Norton, 107 Fed. 412.....46 C. C. A. 387

§ 2. Offenses against postal laws.

In a prosecution of a defendant under Rev. St. § 5480, on an indictment charging him with having devised a scheme to defraud, to be effected by the use of the post-office establishment of the United States, where the government introduced evidence, in support of the specific charges made, showing that defendant under an assumed name deposited in a post office circulars addressed to the persons named in the indictment, who were strangers to him, soliciting remittances to be used by him in stock speculations on account of such persons, which circulars contained on their face persuasive evidence of a scheme to defraud, and that defendant received

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through the post office remittances of money from such persons, which he subsequently reported to them as having been lost in such speculations, such evidence was sufficient to warrant the submission of the case to the jury.

—Packer v. United States, 106 Fed. 906.....46 C. C. A. 35

An indictment for a fraudulent use of the mails, in violation of Rev. St. § 5480, as amended by Act March 2, 1889 (1 Supp. Rev. St. p. 694), not charging a scheme to defraud the public generally, or a class not capable of being resolved into individuals, but clearly importing an intention to defraud definite individuals, is bad, if it does not describe them by name, or give a good and true reason for the omission.

—Larkin v. United States, 107 Fed. 697..... 46 C. C. A. 588

Such an indictment, stating the names of persons to whom letters or postal cards were addressed, does not satisfy the requirement that the names of parties intended to be defrauded must be alleged if it is not alleged that the scheme to defraud included them, as use of the mail for communication with a person intended to be injured is not essential to the offense, it being within the statute, if, in aid of the scheme to defraud, the mails be used to open correspondence with the intended victim, or "any person," or to incite "such other person [the one intended to be defrauded], or any person," to open communication with the designer of the scheme.

—Larkin v. United States, 107 Fed. 697..... 46 C. C. A. 588

PRACTICE.

See "Trespass to Try Title," § 1.
Adoption by United States courts of practice of state courts, see "Courts," § 1.
In admiralty, see "Collision," § 6.
In equity, see "Equity."
In land department, see "Public Lands," § 1.
In patent office, see "Patents," § 2.
Particular proceedings in actions, see "Damages," § 1; "Evidence"; "Judgment"; "Jury"; "Limitation of Actions"; "Parties"; "Process"; "Removal of Causes"; "Trial."
Procedure in criminal prosecutions, see "Criminal Law."
Procedure of particular courts, see "Courts."
Procedure on review, see "Appeal and Error"; "New Trial."

PREFERENCES.

Effect of proceedings in bankruptcy, see "Bankruptcy," § 1.

PRELIMINARY INJUNCTION.

See "Trade-Marks and Trade-Names," § 1.

PRESUMPTIONS.

In civil actions, see "Evidence," § 1.
In criminal prosecutions, see "Criminal Law," § 1.
On appeal or error, see "Appeal and Error," § 7.

PRINCIPAL AND AGENT.

See "Factors."

§ 1. **The relation.**
Agents who are authorized by the owner to sell a yacht are not thereby given any authority, either actual or apparent, to sell a naptha launch.

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sometimes used as a tender to the yacht, but which was not legally an appurtenance thereto, but a separate vessel, and, in the absence of actual authority, they cannot bind the owner by a sale of the launch.
—Forrest v. Vanderbilt, 107 Fed. 734.....46 C. C. A. 611

PRINCIPAL AND SURETY.

Liabilities of sureties on bond of mint superintendent, see "United States," § 1.
Liabilities of sureties on bond of postmaster, see "Post Office," § 1.

§ 1. Nature and extent of liability of surety.
Sureties on a bond of a contractor, conditioned for payment of persons supplying him with "labor or materials," are not liable to a bank which, under an arrangement to supply the contractor with funds, pays the time checks given the laborers and the orders given the material men; the same being indorsed merely as evidence of payment, without any assignments of the claims being made.
—United States v. Rundle, 107 Fed. 227.....46 C. C. A. 251

§ 2. Discharge of surety.
Under a sales agent's contract he was to pay cash on receipt of a bill of lading, and to keep strict account of all goods received by and returned by him, and his sureties bound themselves to pay or cause to be paid to his principal all sums which should become due on account of shipments to him or on his order during one year, during which all payments by him were to be made promptly in the ordinary course of business. *Held*, that failure of the agent to pay cash for any shipment on the receipt of the bill of lading was a breach of contract entitling his principal to proceed against him and his sureties to enforce collection of the debt then due, and hence his sureties were entitled to call on authorized agents of his principal for information as to the state of his accounts, and if, by their misrepresentations, the sureties changed their position to their detriment, they were discharged from liability.
—St. Louis Brewing Ass'n v. Hayes, 107 Fed. 395....46 C. C. A. 370

§ 3. Remedies of creditors.
Judgment by default against the principal in an action on a bond against principal and sureties is, at most, only prima facie evidence against the sureties, who put in issue their liability, and incidentally that of the principal.
—United States v. Rundle, 107 Fed. 227.....46 C. C. A. 251

PRIORITIES.

Of claims against street railroad, see "Street Railroads," § 1.
Of mortgages, see "Chattel Mortgages," § 1.

PROCESS.

On appeal, see "Appeal and Error," § 4.

§ 1. Service.
The right to garnish a debtor is not limited to the situs of the chose in action, and a garnishment by a citizen of one state of a debtor of the same state, whose creditor resides, whose debt was contracted and is payable in another state, is such an attachment of the chose in action as will authorize the court to obtain jurisdiction to dispose of it by publication of the summons against the defendant.
—Tootle v. Coleman, 107 Fed. 41.....46 C. C. A. 132

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PROMISSORY NOTES.

See "Bills and Notes."

PROPERTY.

See "Copyrights"; "Fixtures."

PROVINCE OF COURT AND JURY.

In civil actions, see "Trial," § 4.

PUBLICATION.

Of summons, see "Process," § 1.

PUBLIC DEBT.

See "Municipal Corporations," § 3; "Towns," § 1.

PUBLIC LANDS.

§ 1. Survey and disposal of lands of United States.

The land department of the United States is a quasi judicial tribunal, invested with authority to hear and determine claims to the public lands subject to its disposition, and its decisions of the issues presented at such hearings, and its patents issued thereon, are impervious to collateral attack.

—James v. Germania Iron Co., 107 Fed. 597; Belden v. Midway Co., Id. .....46 C. C. A. 476

But a patent or decision of the land department is not impregnable to direct attack. The legal title derived from it may be charged with a trust for the benefit of the party lawfully entitled to it either on the ground (1) that, upon the facts found, conceded, or established without dispute at the final hearing before the department, its officers fell into a clear error in the construction of the law applicable to the case which caused them to issue the patent to the wrong party, or for the reason (2) that through fraud or gross mistake they fell into a misapprehension of the facts proved before them which had the like effect.

—James v. Germania Iron Co., 107 Fed. 597; Belden v. Midway Co., Id. .....46 C. C. A. 476

One who would attack a patent or decision of the department for a mistake of fact, however, must plead and prove the evidence before the department from which the mistake resulted, the particular mistake that was made, the way in which it occurred, and the fact that, if it had not been made, the decision would have been otherwise, and the patent would not have issued to the patentee, before any court can enter upon the consideration of the original issue of fact determined by the department.

—James v. Germania Iron Co.. 107 Fed. 597; Belden v. Midway Co., Id. .....46 C. C. A. 476

The equitable title to land acquired by a lawful entry cannot be devested or affected by subsequent decisions of the land department, or subsequent rules or modification of rules of practice therein.

—James v. Germania Iron Co., 107 Fed. 597; Belden v. Midway Co., Id. .....46 C. C. A. 476

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The entry of public land under the laws of the United States, whether legal or illegal, segregates it from the public domain, appropriates it to private use, and withdraws it from subsequent entry or acquisition until the prior entry is officially canceled and removed.
—James v. Germania Iron Co., 107 Fed. 597; Belden v. Midway Co., Id. .....46 C. C. A. 476

Rules of practice of the land department formally established and promulgated by authority of the secretary of the interior can be repealed or abrogated by like formal action and publication only. Decisions or opinions of the secretary and the commissioner in contests between claimants for specific tracts of land ignoring or violating rules neither repeal nor modify them.
—James v. Germania Iron Co., 107 Fed. 597; Belden v. Midway Co., Id. .....46 C. C. A. 476

The rule of practice of the land department that after the local land officers made their reports to the commissioner of a contest over an entry of land they should "thereafter take no further action affecting the disposal of the land in contest until instructed by the commissioner" was in force in 1889, and it prohibited the acquisition of any legal or equitable right to the land through the local land officers during the time between the date of a decision or judgment of the secretary or commissioner canceling the prior entry and the receipt by the local land officers of official notice of that judgment as well as during the time between the making of the original reports of the contest and the date of the decision.
—James v. Germania Iron Co., 107 Fed. 597; Belden v. Midway Co., Id. .....46 C. C. A. 476

On February 18, 1889, the secretary of the interior decided that a prior entry of a certain tract of land was void, and that the land was open to disposal under the land laws. This decision was communicated to the local land officers on February 22, 1889. On February 19, 1889, A. made an application to the local officers to enter the land. B. was the first applicant to enter it after the local officers received official notice of the decision canceling the prior entry. The secretary decided that A. acquired the superior right to the land, and issued a patent in accordance with this conclusion. *Held*, this decision was a clear error of law, and B., the first applicant after the local officers were officially notified of the decision, was entitled to a decree charging the title under the patent with a trust for his benefit.
—James v. Germania Iron Co., 107 Fed. 597; Belden v. Midway Co., Id. .....46 C. C. A. 476

PUBLIC POLICY.

Effect on validity of contract, see "Contracts," § 1.

PUBLIC WATER SUPPLY.

See "Waters and Water Courses," § 1.

QUESTIONS FOR JURY.

In civil actions, see "Trial," § 8.

RAILROADS.

See "Street Railroads."
As employers, see "Master and Servant," § 2.

§ 1. **Indebtedness, securities, liens, and mortgages.**
A trustee in a railroad mortgage cannot be held liable to the bondholders because of its failure to defend a suit for the forfeiture of a land

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grant to which the company would have been entitled on making a certain payment, where it is not shown that there was any defense, or that the rights of the company had not previously been lost without fault of its defendant.
—Frishmuth v. Farmers' Loan & Trust Co., 107 Fed. 169; Antelo v. Same, Id.....46 C. C. A. 222

REAL ACTIONS.

See "Trespass to Try Title."

RECEIVERS.

State laws as rules of decision, see "Courts," § 1.

RECORDS.

Transcript on appeal or writ of error, see "Appeal and Error," § 5.

REHEARING.

See "New Trial."

RELEASE.

See "Chattel Mortgages," § 2; "Compromise and Settlement"; "Payment."

RELEVANCY.

Of evidence in civil actions, see "Evidence," § 2.

REMAND.

Of cause removed from state court, see "Removal of Causes," § 2.

REMOVAL OF CAUSES.

§ 1. **Proceedings to procure and effect of removal.**
When a cause of action which is removable is first disclosed by an amended complaint filed after the time has expired for pleading to the original complaint, an application for removal should be filed at once, or within the time allowed by statute or rule of court to answer the amended complaint, when such time is prescribed by the local law; otherwise, the right of removal is waived.
—Jones v. Mosher, 107 Fed. 561.....46 C. C. A. 471

§ 2. **Remand or dismissal of cause.**
One who removes a case from a state to the federal court is estopped from attacking the jurisdiction of the latter upon any ground except that the court from which it was removed had no jurisdiction.
—Tootle v. Coleman, 107 Fed. 41.....46 C. C. A. 132

A petition for removal, upon which a cause was removed, but was subsequently remanded, is functus officio, and has no effect upon an amended complaint subsequently filed, even if such complaint renders the cause removable.
—Jones v. Mosher, 107 Fed. 561.....46 C. C. A. 471

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Under 24 Stat. 553, c. 373, forbidding appeal or error from an order remanding a cause from a federal to a state court, but providing that nothing therein contained should be held to repeal or affect any jurisdiction or right mentioned in Rev. St. § 641, which provides that "on the petition of defendant" in certain cases a cause may be removed to the federal courts, the contention of the plaintiff in a suit brought in a state court that his right to removal was founded on such section 641, and therefore he had a right to bring error from an order of the federal court remanding the cause, was idle, since right to removal under section 641 is limited to a defendant.
—Cole v. Garland, 107 Fed. 759; Same v. McCall, Id..46 C. C. A. 626

The contention of a party to a suit brought in a state court that his right to removal of the cause to a federal court was founded on Rev. St. § 641, and no right mentioned therein was affected by 24 Stat. 553, c. 373, forbidding error or appeal from an order of a federal court remanding a cause to a state court, and therefore he had a right to bring error from an order so remanding a cause,—could not prevail, since such section 641 conferred no right to review such an order.
—Cole v. Garland, 107 Fed. 759; Same v. McCall, Id..46 C. C. A. 626

Under 24 Stat. 553, c. 373, § 6, repealing 18 Stat. 472, c. 137, § 5, which authorized a writ of error or appeal from an order remanding a cause to a state court; and 24 Stat. 553, c. 373, § 2, providing that whenever any cause shall be removed from any state court into any circuit court of the United States, and the circuit court shall remand the cause to the state court, no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed,—a writ of error from an order of a United States circuit court remanding a cause to the state court would be dismissed, the appropriate remedy being error to the state supreme court, should that court determine the question of federal jurisdiction adversely.
—Cole v. Garland, 107 Fed. 759; Same v. McCall, Id..46 C. C. A. 626

REPAIRS.

Maritime liens for repairs, see "Maritime Liens," § 1.

REPEAL.

Of rules of land department, see "Public Lands," § 1.
Of statute, see "Statutes," § 1.

REQUESTS.

For instructions to jury in civil actions, see "Trial," § 4.

RES JUDICATA.

See "Judgment," § 2.

REVENUE.

See "Customs Duties"; "Internal Revenue"; "Taxation."

REVIEW.

See "Appeal and Error"; "Criminal Law," § 4.
Bill in equity, see "Equity," § 1.

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RISKS.

Within insurance policy, see "Insurance," § 6.

ROADS.

Streets in cities, see "Municipal Corporations," § 2.

SALES.

By factors, see "Factors."
Of property of decedent under order of court, see "Executors and Administrators," § 2.
Of vessels, see "Shipping," § 1.

§ 1. **Performance of contract.**
Pending the passage of the Wilson tariff bill of 1894, defendant filled an order for lard at Chicago to be shipped to plaintiffs in Cuba, the goods to be delivered to the purchasers at the point of shipment, but delay, for which the defendants were in no way responsible, occurred in forwarding a part of it by vessel from New Orleans, and before it reached Havana plaintiffs had to pay duties imposed thereon by the Spanish government in retaliation for the passage of the Wilson bill, and which, but for the delay, would not have been collected. *Held*, that the risk of such a result was taken by plaintiffs, and they could not claim reimbursement from defendants therefor.
—Coca v. Morris, 107 Fed. 688.....46 C. C. A. 558

SALVAGE.

§ 1. **Amount and apportionment.**
A contract by one party to pay at all events, and by the other to receive a fixed or deserved compensation for salvage services, is as conclusive and enforceable as any other valid contract.
—Elphicke v. White Line Towing Co., 106 Fed. 945; White Line Towing Co. v. Elphicke, Id.....46 C. C. A. 56

The burden of establishing such an agreement by a fair preponderance of evidence is upon the owners or claimants of the vessel or cargo who allege it.
—Elphicke v. White Line Towing Co., 106 Fed. 945; White Line Towing Co. v. Elphicke, Id.....46 C. C. A. 56

SATISFACTION.

See "Compromise and Settlement"; "Payment."

SECONDARY EVIDENCE.

In civil actions, see "Evidence," § 3.

SENTENCE.

In criminal prosecutions, see "Criminal Law," § 8.

SERVICE.

Of process, see "Process," § 1.

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SETTLEMENT.

See "Compromise and Settlement"; "Payment."

SHIPPING.

See "Admiralty"; "Collision"; "Maritime Liens"; "Salvage."

§ 1. **Title.**

A naptha launch used by the owner as a tender, in connection with a 30-foot yacht owned by him, but which could not be carried on the yacht, did not accompany it on its trips, and was not a part of the usual equipment of such yachts, did not by such use, merely as a matter of convenience, become an appurtenance of the yacht, which passed by a sale of the latter.

—Forrest v. Vanderbilt, 107 Fed. 734.....46 C. C. A. 611

§ 2. **Carriage of goods.**

A cargo of hides and similar articles shipped from South American ports to New York was found at the conclusion of an unusually long voyage, during warm weather, to be seriously damaged from decay. The bills of lading recited that the cargo was received in apparent good order and condition. The cargo owners alleged that the damage was caused by sea water entering the ship through some defect or unfitness, or by want of proper care, while the defense was that the injury resulted from sweating, heat, or natural decay, or from latent defects or dampness existing prior to shipment. The voyage was without storms or unusual weather. *Held*, upon a consideration of all the evidence, that there was no damage by sea water through any leaks or imperfection of the ship, which was shown to be in good condition and thoroughly equipped for the removal of any accumulation of water in the bilges, which nothing in the circumstances of the voyage rendered excessive; that the damage was due either to an excess of moisture in the cargo before shipment, which produced the decay during the long voyage, or to an accumulation of water in the bilges because of their not having been given proper attention by reason of the sickness and death of three of the engineers from yellow fever during the voyage, in which case the failure to use the pumps was a fault in the management of the vessel, for which the owners were exempted from liability by section 3 of the Harter act.

—The Merida, 107 Fed. 146.....46 C. C. A. 208

A provision of a bill of lading that the ship is not to be answerable for loss through any "latent defect in the machinery or hull not resulting from want of due diligence by the owners" does not cover a condition of unseaworthiness existing at the commencement of the voyage, but applies only to a state of unseaworthiness arising during the voyage.

—The Aggi, 107 Fed. 300.....46 C. C. A. 276

A cargo of sugar was damaged on a voyage from Java to Boston by sea water which entered around loosened bolts securing in place a wooden scroll work under the ship's figurehead, and extending some feet from the prow on either side of the vessel. These bolts extended through the ship's plates, being fastened by nuts on the inside, and were in such position that water entering through the holes would readily flow into the fore peak, where the sugar damaged was stowed. The action of the seas upon the scroll work, especially in rough weather and when the ship was heavily laden, would naturally tend to gradually loosen the nuts on such bolts. The bolts had not been inspected for two years, and there was no evidence showing whether or not the nuts were loose at the beginning of the voyage, except the testimony of the officers that there was no leakage on the previous voyage. On the voyage the ship was heavily

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laden and encountered some heavy weather, but not more than should have reasonably been anticipated. *Held* that, if the bolts were loose at the inception of the voyage, the ship was in that respect unseaworthy, from the consequences of which the owners were not relieved from liability by the provisions of the Harter act, and that the evidence was not sufficient to overcome the presumption of fault which arises against the carrier when goods are damaged during their transportation.

—The Aggi, 107 Fed. 300.....46 C. C. A. 276

Where a charter party and a bill of lading contain exceptions in behalf of the vessel of breakage and leakage and of dangers of the sea, and the cargo owner maintains that the true cause of injury to the cargo was improper stowage, the burden of maintaining this proposition rests on the cargo owner.

—Crowell v. Union Oil Co., 107 Fed. 302.....46 C. C. A. 296

The general course of business in forwarding when the ship of the signer of a through bill of lading does not go all the way to the port of ultimate destination, of which fact the shipper has knowledge, or is given notice by the through bill of lading, and the manifest necessity of transshipment by the through undertaker under such contract as it can reasonably make, justifies the presumption of its authority to make such contract, and to bind the shipper thereby, although the terms of the new contract may not be in all respects the same as its own; but, in any event, the undertaking and liability of the second carrier are measured by its own contract, provided its terms are reasonable, and not in contravention of the maritime law.

—The St. Hubert, 107 Fed. 727.....46 C. C. A. 603

A provision of a bill of lading that the shipowner is not to be liable for any claim, "notice of which is not given before the removal of the goods," properly construed, does not require such notice to be given before the goods are taken from the ship, but before their removal from the dock where they are deposited by the ship, and where, after they are released from the ship's tackle, they may be inspected and examined, both by the consignees and the officers of the ship. So construed, such provision is reasonable and valid.

—The St. Hubert, 107 Fed. 727.....46 C. C. A. 603

A provision of a bill of lading that "the shipowner is not to be liable * * * for any claim, notice of which is not given before the removal of the goods," imposes a reasonable and valid condition precedent to the right to maintain a suit for damage to the goods in shipment, either against the shipowner personally or in rem; and a failure to comply with such condition is not excused by the fact that the ship had knowledge of the damage, the purpose of the requirement being to advise the owners that they are charged with liability therefor.

—The St. Hubert, 107 Fed. 727.....46 C. C. A. 603

§ 3. **Demurrage.**

Where a charter party provided that 14 working days should be allowed for loading the vessel in the port of Pensacola, and that the custom of each port was to be observed in all cases, and the vessel was delayed more than 14 working days owing to the members of labor organizations refusing to work on days generally recognized as working days, a contention that, the practice of such labor organizations being known to shipowners, the delay should be excused, under the clause relative to customs of ports, was without merit, since the custom of labor organizations in the port of Pensacola, and their manner of refusing to work, being known to the charterer of a ship, if he wished to protect himself from the results of their refusal to work on days generally regarded as working days he should so provide in his charter party.

—Hagerman v. Norton, 105 Fed. 996.....46 C. C. A. 1

Where a charter provided that a vessel should proceed to Pensacola and there load, the cargo to be delivered alongside, and that 14 working days should be allowed the charterers for loading the vessel, a contention

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that under the terms of the charter party the duty of the charterer was ended when the cargo was delivered alongside, and that all delays in loading and stowing the cargo were at the risk of the shipowner, was without merit.
—Hagerman v. Norton, 105 Fed. 996.....46 C. C. A. 1

Where a charter provided that a certain number of working days should be allowed for loading the vessel, detention caused by strikes or "estoppage of labor" not included, days on which those loading the vessel refused to work owing to storms, and days when the labor organizations withdrew their members to attend a funeral and for the celebration of Labor Day, should not be excepted from the days allowed for loading; all days save Sundays and legal holidays being working days, and there having been no forced stoppage, within the meaning of the charter party.
—Hagerman v. Norton, 105 Fed. 996.....46 C. C. A. 1

A provision in a charter for carrying lumber that the cargo should be furnished "at the port of loading as fast as vessel can receive and properly stow same in suitable hours and weather," has reference to the hours and weather suitable for loading and stowage, and does not excinde time lost by reason of the lumber becoming wet, and unfit for loading, before it is forwarded to the ship.
—Durchmann v. Dunn, 106 Fed. 950.....46 C. C. A. 62

A provision in a charter party that cargo shall be "discharged at port of destination at the average rate of not less than 35,000 superficial feet per running day, Sundays and holidays excepted," refers as to the rate to the discharge at the port of destination, and not to the loading.
—Durchmann v. Dunn, 106 Fed. 950.....46 C. C. A. 62

Where charterers neglected to advise their agents at the port of destination of their agreement to attend to the entering of the ship at the custom house upon her arrival, by reason of which such agents refused to act, and a delay of three days was caused in having the ship entered, the owners were entitled to include such days in the lay days allowed by the charter for discharging.
—Hagar v. Elmslie, 107 Fed. 511.....46 C. C. A. 446

A provision of a charter allowing the charterer a certain number of lay days for loading and discharging, and requiring the payment of demurrage for any additional time taken, is an absolute and unconditional engagement on the part of the charterer, who cannot be relieved therefrom except on the ground that the delay was due to the fault or negligence of the owner, or those for whom he is responsible; and such fault or negligence is an affirmative defense in a suit to recover the stipulated demurrage, the burden of pleading and proving which rests upon the charterer.
—Hagar v. Elmslie, 107 Fed. 511.....46 C. C. A. 446

§ 4. **Limitation of owner's liability.**
The value of the vessel and freight for the purposes of limitation of liability is to be assessed at no later period than the termination of the voyage during which the collision happened.
—The George L. Garlick, 107 Fed. 542; In re Moran, Id.....
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STATUTES.

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§ 1. Repeal, suspension, expiration, and revival.
Section 7 of the judiciary act of March 3, 1891, relating to the jurisdiction of the circuit courts of appeals, was amended by Act Feb. 18, 1895, "to read as follows * * *," and by Act June 6, 1900, the original section was again amended "to read as follows * * *." *Held*, that the original section and the amendatory act of 1895 were necessarily repealed by the later act, though it did not declare in terms the repeal of either.
—Rowan v. Ide, 107 Fed. 161.....46 C. C. A. 214

The act of June 6, 1900, providing that section 7 of the act of 1891, relating to the jurisdiction of the circuit court of appeals as to injunction cases, should be amended to read as therein prescribed, is valid, notwithstanding it purports to amend a section of the act which had already been amended by the act of February 18, 1895, to which it did not refer, and its enactment necessarily operates to repeal the latter amendment.
—Heinze v. Butte & B. Consol. Min. Co., 107 Fed. 165.....
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STOCK EXCHANGES.

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STOCKHOLDERS.

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STREET RAILROADS.

See "Carriers," § 1.

§ 1. **Establishment, construction, and maintenance.**

A mortgage of a street-railroad system covering after-acquired property creates a lien on engines thereafter furnished to the company in constructing a plant which was a part of its system, and is not to be displaced by a stipulation in the contract of sale that title should not pass till they were fully paid for.

—Guaranty Trust Co. of New York v. Galveston City R. Co., 107 Fed. 311; Same v. City of Galveston, Id.....46 C. C. A. 305

A creditor of a street-railroad company is not entitled to a preference over a mortgage lien in the distribution by a receiver of the income or proceeds of the property on foreclosure simply because that which he furnished the company prior to the receiver's appointment was for the preservation of the property and for the benefit of the mortgage security, though that would be important in considering the equity of his claim to a preference.

—Guaranty Trust Co. of New York v. Galveston City R. Co., 107 Fed. 311; Same v. City of Galveston, Id.....46 C. C. A. 305

A court of equity, engaged in administering mortgaged railroad property under a receivership in a foreclosure suit, in distributing the income or proceeds of the property may prefer to the prior mortgage lien unpaid claims for current expenses of its ordinary operation within a limited time before the receivership; and hence the preference in such a case of claims for current expenses of a street railroad accruing five or six months before the receiver's appointment was proper, but not of claims for labor and materials furnished, at the latest, a year and a half prior thereto, and for which the company's notes had been given and renewed beyond the date of the receiver's appointment.

—Guaranty Trust Co. of New York v. Galveston City R. Co., 107 Fed. 311; Same v. City of Galveston, Id.....46 C. C. A. 305

STREETS.

See "Municipal Corporations," § 2.

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TARIFF.

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TAXATION.

See "Customs Duties"; "Internal Revenue"; "Municipal Corporations," § 3.

§ 1. **Nature and extent of power in general.**

The promotion of the construction and operation of mills and factories to manufacture sorghum cane into sugar or syrup is a private, and not a public, purpose.

—Dodge v. Mission Tp., Shawnee County, Kan., 107 Fed. 827..... 46 C. C. A. 661

The power of a legislature to levy or to authorize the levy of a tax, and to create or authorize the creation of a public debt to be paid by taxation, is limited to its exercise for a public purpose.

—Dodge v. Mission Tp., Shawnee County, Kan., 107 Fed. 827..... 46 C. C. A. 661

The decision of the question whether a tax or a public debt is for a public or private purpose is not a legislative, but a judicial, function. A legislature cannot make a private purpose a public purpose, or draw to itself or create the power to authorize a tax or a debt for such a purpose, by its mere fiat.

—Dodge v. Mission Tp., Shawnee County, Kan., 107 Fed. 827..... 46 C. C. A. 661

§ 2. **Collection and enforcement against persons or personal property.**

In support of an injunction against the taxation of corporate stock belonging to complainant, a Kentucky corporation, its president made affidavit that it owned the stock of the M. Co. in question; that it stood on its books at a specified value, and formed a part of complainant's reported capital and surplus; and that the M. Co. was a Kentucky corporation, and as such pays taxes on its property and franchises. *Held*, in the absence of contradiction, to fairly establish that the M. Co. was a Kentucky corporation, which paid taxes on its property and franchises, thus excluding complainant, as an individual stockholder, pursuant to Ky. St. §§ 4085, 4088, from taxation on its holdings therein.

—Louisville Trust Co. v. Stone, 107 Fed. 305.....46 C. C. A. 299

TELEGRAPHS AND TELEPHONES.

§ 1. **Establishment, construction, and maintenance.**

Act Cong. July 24, 1866 (Rev. St. §§ 5263–5268), provides that any telegraph company organized under the laws of any state may construct and maintain telegraph lines over any portion of the public domain, and over and along any military or post road of the United States, provided that such lines shall be so constructed and maintained as not to interfere with travel. Act Cong. June 8, 1872 (Rev. St. § 3964), declares that all letter-carrier routes established in any city or town shall be post roads. *Held*, that an interstate telegraph company which had accepted the provisions of the act of 1866 was not entitled to erect and maintain its lines over the streets of a city without complying with the reasonable regulations of the city for the erection and maintenance of such lines, and without procuring a permit therefor from the city

—City of Toledo v. Western Union Tel. Co., 107 Fed. 10..... 46 C. C. A. 111

Such act was strictly limited to the business of telegraph companies as such, and hence did not authorize a telegraph company accepting the act to use the streets of a city for the installation of a district telegraph system for the purpose of the collection and delivery of telegraph messages, and the maintenance of a messenger system, fitted with call boxes for watchman, fire, burglar, and police signals, and for the employment of

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messenger boys to carry messages and packages, run miscellaneous errands, distribute posters, etc., within the city.
—City of Toledo v. Western Union Tel. Co., 107 Fed. 10..... 46 C. C. A. 111

THEATERS AND SHOWS.

Fixtures in theater, see "Fixtures."

TIME.

To apply for removal of cause to federal court, see "Removal of Causes," § 1.

TITLE.

To vessels, see "Shipping," § 1.

TOLLS.

Toll bridges, see "Bridges," § 1.

TORTS.

See "Libel and Slander"; "Negligence"; "Trover and Conversion."
Employés, see "Master and Servant," § 3.
Maritime torts, see "Collision."

TOWNS.

See "Counties"; "Municipal Corporations."

§ 1. **Fiscal management, public debt, securities, and taxation.**
A township in Ohio is not a corporation, within the meaning of the state constitution; and article 13, § 1, of such constitution, providing that the legislature shall pass no special act conferring corporate powers, does not render invalid an act authorizing a township to issue bonds.
—Board of Trustees of Hardy Tp., Holmes County, Ohio, v. Brattleboro Savings Bank, 106 Fed. 986.....46 C. C. A. 66

TRADE-MARKS AND TRADE-NAMES.

§ 1. **Infringement and unfair competition.**
Complainant was proprietor of the word "Cuticura" as a trade-mark for a toilet soap. Defendant placed on the market a soap which it called "Cuticle." There was nothing in the box, wrapper, or general get-up of the package which tended in any way to induce the purchaser of the latter soap to believe that he was purchasing the former. *Held* insufficient to authorize injunction at suit of complainant.
—Potter Drug & Chemical Corp. v. Pasfield Soap Co., 106 Fed. 914.... 46 C. C. A. 40

To authorize the granting of a preliminary injunction against unfair competition by imitation of packages, the right should be clear; and where it was not shown in support of the motion that any purchaser had ever in fact been deceived, and the question whether the similarity complained of was such as was likely to deceive ordinary purchasers could not be determined with certainty on the evidence adduced, the discretion

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of the trial court, exercised in denying the motion, will not be interfered with by the appellate court.
—Pfeiffer v. Wilde, 107 Fed. 456.....46 C. C. A. 415

The name "Vichy," a geographical name applied to mineral waters by the owners of springs in the commune of Vichy, France, to designate the locality of origin, and indicate the general characteristics of their waters, long favorably known to the trade, was very prominently displayed on labels on bottles purporting to contain "Saratoga Vichy Water," the "Saratoga" over it being in far less conspicuous type, so that, if the bottles stood on a table or shelf, the word "Vichy" was the marked and prominent object of sight, but otherwise purchasers would not mistake it for the French article. *Held*, that its effect was to represent to purchasers unaccustomed to the article that the water in such bottles came from the French wells, and that the use of the name in such form should be enjoined.
—La Republique Francaise v. Saratoga Vichy Springs Co., 107 Fed. 459 .....46 C. C. A. 418

TRESPASS TO TRY TITLE.

§ 1. **Proceedings.**
Tex. Rev. St. 1895, art. 3342, declares that peaceable and adverse possession of real estate for five years bars a recovery, and section 3201 provides that such statute shall not run against a married woman. Laws April 1, 1895, abolished such exception, but provided that the disability of married women shall continue for one year from and after the passage of the act, and that they shall have, therefore, the same time to sue as is allowed others by the provisions of the act. *Held*, that limitations did not begin to run against an action to recover real property by a married woman until one full year had expired after the act took effect, and that a contention that the time elapsed before the adoption of the amendment should be counted allowing married women one year to sue after the adoption of the amendment was not sustainable.
—Thompson v. McConnell, 107 Fed. 33.....46 C. C. A. 124

In trespass to try title, plaintiff claimed a described portion of lot 14, according to the T. survey, which subdivided a grant into lots. The statute of limitations was pleaded as a defense, but the underlying issue was whether such survey was actually made on the ground, and was valid, and should prevail, as to boundaries and lot lines, over a subsequent survey. The verdict was in favor of plaintiff "for the land in controversy, except that part of the northwest part of lot 14" which a defendant named had inclosed. It further found "for the defendant the small triangular shaped piece of land situate in said northwest corner of said lot 14, showing a width of about 16 feet on the north line of said lot 14, and running to a point in the west line of said lot 14 about 200 feet south of the northwest corner of said lot 14." *Held*, that the lot 14 referred to must be the lot 14, as bounded and described in the T. survey; that the triangular piece described in the second clause of the verdict was intended to be identical with the exception in the first clause; and that the word "about," twice used in the second clause, should be rejected as surplusage, so far as it tended to render the verdict vague or uncertain; and that, as thus construed, the verdict was not so vague, uncertain, and indefinite as to afford no basis for a valid judgment.
—Cochran v. Schreiber, 107 Fed. 371.....46 C. C. A. 349

TRIAL.

See "Libel and Slander," § 2; "New Trial"; "Trover and Conversion," § 1; "Witnesses."
Action for personal injuries to servant, see "Master and Servant," § 2.
Action on insurance policy, see "Insurance," § 8.

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Assessment of damages, see "Damages," § 1.
Criminal prosecutions, see "Conspiracy," § 1; "Criminal Law," § 2.
Trespass to try title to real property, see "Trespass to Try Title."

§ 1. Notice of trial and preliminary proceedings.

The act of March 3, 1875, makes it the duty of the circuit court to dismiss any suit on its own motion at any time, if it appears to its satisfaction that the suit "does not involve a dispute or controversy properly within the jurisdiction of said circuit court"; and hence where defendant properly raised a question of jurisdiction by plea in abatement alleging that both parties were citizens of the same state, there was no error in submitting the same to the jury as a separate issue, irrespective of the issue on the merits.

—Terry v. Davy, 107 Fed. 50.....46 C. C. A. 141

§ 2. Reception of evidence.

A party offering evidence is entitled to have the specific ground of objection thereto stated.

—Massenberg v. Denison, 107 Fed. 18.....46 C. C. A. 120

Plaintiff, in an action for an injury received by him, while in defendant's employ in a coal mine, from explosion of gas, through the alleged negligence of the fire boss in failing to attend to the ventilation on complaint of plaintiff, having in his case in chief given evidence of the nature of the duties of the fire boss, and defendant having met this by evidence that a published rule of defendant required complaint to be made to the mine foreman, and that no one but him had any right to interfere with the ventilation, it is in the discretion of the court to refuse to receive on rebuttal testimony that it was the duty of the fire boss to attend to ventilation on complaint; this being but cumulative evidence of what plaintiff was required to prove in opening his case.

—Sommer v. Carbon Hill Coal Co., 107 Fed. 230.....46 C. C. A. 255

Where plaintiff, suing for libel, offered no evidence to support an unnecessary allegation of character and reputation, there was no error in excluding evidence intended to contradict such allegation.

—Tribune Ass'n v. Follwell, 107 Fed. 646.....46 C. C. A. 526

Where a witness who wrote a libelous article, for the publication of which action was brought, had already testified that trust in a reporter's accuracy made him accept the story, a question as to what were the grounds of his belief of the truth of the facts stated in the article might fairly have been excluded as cumulative.

—Tribune Ass'n v. Follwell, 107 Fed. 646.....46 C. C. A. 526

Where, in an action for publishing a libelous dispatch, a witness concerned in its publication had already answered that he knew nothing at all about plaintiff, a question as to whether he knew of plaintiff's history in a place where he formerly resided was properly excluded.

—Tribune Ass'n v. Follwell, 107 Fed. 646.....46 C. C. A. 526

§ 3. Taking case or question from jury.

Though, in an action against a railroad for death of a brakeman, the only direct evidence that notice of the danger was given deceased is the testimony of the conductor, whose duty it was to bring the bulletin in regard to it to the knowledge of the trainmen, his credibility is not for the jury, on the ground of his interest to show that he had done his duty; his testimony not being contradicted or brought in question by cross-examination or the admitted facts, and there being nothing else in the case tending to raise a doubt as to the truth of his testimony.

—Hauss v. Lake Erie & W. R. Co., 105 Fed. 733.....46 C. C. A. 94

Where in an action for the recovery of real property it would have been the court's duty to have set aside a verdict for the defendants if returned, the court properly directed a verdict in favor of plaintiffs.

—Thompson v. McConnell, 107 Fed. 33.....46 C. C. A. 124

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Refusal of a peremptory instruction for defendant at the close of plaintiff's evidence was proper, if at the time of the request therefor defendant had not rested, but afterwards introduced evidence in its own behalf.
—Mexican Cent. Ry. Co. v. Glover, 107 Fed. 356.....46 C. C. A. 334

Where the evidence was uncertain and conflicting as to a material fact, and left the question in doubt, there was no error in refusing to peremptorily direct a verdict.
—Cochran v. Schreiber, 107 Fed. 371.....46 C. C. A. 349

Where there was evidence, though contradicted, strongly tending to support the fact on which plaintiff's case depended, error cannot be predicated on the refusal of a peremptory instruction for defendant.
—Fidelity & Casualty Co. of New York v. Dorough, 107 Fed. 380.... 46 C. C. A. 364

§ 4. **Instructions to jury.**
The question of the duty of a coal-mine owner as regards ventilation being controlled by a statute providing for ventilation by certain means and in a certain manner, it is sufficient for the court, in instructing as to the master's duty, to read the statute.
—Sommer v. Carbon Hill Coal Co., 107 Fed. 230.....46 C. C. A. 255

In an action on a life insurance policy, the court properly cautioned the jury to closely scan evidence prepared by defendant's inspectors, who offered in evidence written statements which they had obtained, tending to contradict witnesses for plaintiff.
—Fidelity Mut. Life Ass'n v. Jeffords, 107 Fed. 402...46 C. C. A. 377

No error can be predicated on a refusal to restate in another form a portion of the charge which correctly and sufficiently stated the proposition requested.
—Tribune Ass'n v. Follwell, 107 Fed. 646.....46 C. C. A. 526

An instruction, in a suit on a policy, that a sworn ex parte statement of a witness, which was in conflict with a deposition of the witness subsequently taken, might be considered, in connection with the deposition, as evidence of the facts recited in such statement, and "with like effect as the deposition," was properly refused, since it was the province of the jury to determine, in the light of the different circumstances under which the statement was made and the deposition was taken, whether they would treat the statement "with like effect" and as entitled to the same credence as the deposition.
—Connecticut Mut. Life Ins. Co. v. Hillmon, 107 Fed. 834..... 46 C. C. A. 668

Where the issue as to whether a body alleged to be that of the insured was in fact the insured's body was fairly submitted to the jury, in a suit on a policy the defense to which was that the insured was not dead, an instruction that there was undisputed evidence that such body had a perfect set of teeth, and, if the jury found that the insured had imperfect teeth, the verdict should be for the defendant, was properly refused, because there was some conflict in the evidence as to the kind of teeth which the deceased had, and because there were many other facts and circumstances which had an immediate bearing upon the issue whether the body produced was that of the insured, and the instruction asked, therefore, singled out one fact bearing on the question of identity, and gave it undue prominence.
—Connecticut Mut. Life Ins. Co. v. Hillmon, 107 Fed. 834..... 46 C. C. A. 668

TROVER AND CONVERSION.

§ 1. **Actions.**
In a suit for conversion, to recover the value of a large number of articles claimed as personal property by plaintiff, it is proper for the court to submit to the jury a schedule of the articles in controversy, to

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aid them in fixing the value of the property, provided such schedule conforms to the evidence.
—New York Life Ins. Co. v. Allison, 107 Fed. 179....46 C. C. A. 229

TRUSTS.

Trust deeds, see "Chattel Mortgages"; "Railroads," § 1.

§ 1. **Management and disposal of trust property.**
Plaintiffs had manufactured a quantity of lumber for a lumber company under a contract that it should be delivered for shipment, as required by the company. Being behind in its payments, plaintiffs refused to make further deliveries without payment, and defendant entered into a contract by which he agreed to take charge of future deliveries, and pay the proceeds thereof to plaintiffs to apply on their claim. *Held*, that he occupied the position of a trustee under such agreement, and could not sell lumber delivered to him thereunder to a corporation of which he was president, and refuse to account for the proceeds on the ground that such corporation held some claim against plaintiffs or their debtor.
—Choate v. Hoogstratt, 105 Fed. 713.....46 C. C. A. 174

UNFAIR COMPETITION.

See "Trade-Marks and Trade-Names," § 1.

UNITED STATES.

See "Customs Duties"; "Post Office."
Courts, see "Courts," § 1; "Removal of Causes."
Public lands, see "Public Lands," § 1.

§ 1. **Government and officers.**
On recovery on a mint superintendent's bond for a loss of public moneys which he was required to keep safely and turn over when required he should be charged with interest thereon from the date of their receipt until repayment, as provided by Rev. St. § 3624, in relation to all judgments obtained in suits to recover public moneys from persons accountable therefor, and who neglect or refuse to pay into the treasury the sum or balance due.
—Smythe v. United States, 107 Fed. 376.....46 C. C. A. 354

No damage is not a good plea in defense to an action against a mint superintendent to recover on his official bond, conditioned "for the faithful discharge of his duties," for a loss by fire of moneys which his bond required him to keep safely, and pay over when required.
—Smythe v. United States, 107 Fed. 376.....46 C. C. A. 354

In an action against the superintendent of a mint for a loss of public moneys, he is not entitled to a credit where the claim therefor was not shown "to have been presented to the accounting officers of the treasury, and to have been disallowed in whole or in part," etc., as required by Rev. St. § 951, as a condition precedent to its being admitted on the trial.
—Smythe v. United States, 107 Fed. 376.....46 C. C. A. 354

Whether the superintendent of a mint was at fault or not, he and his sureties are liable on his bond "for the faithful discharge of his duties" for the loss by fire of public moneys which the law required him to keep safely, and pay over when required.
—Smythe v. United States, 107 Fed. 376.....46 C. C. A. 354

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USE AND OCCUPATION.

The written lease of the premises was admissible, in an action under the statute against the husband and wife for use and occupation of the premises, to show the value of the use and occupation.
—Walker v. Houghteling, 107 Fed. 619.....46 C. C. A. 512

VACATION.

Of judgment, see "Judgment," § 1.

VENDOR AND PURCHASER.

See "Sales."

VERDICT.

Directing verdict in civil actions, see "Trial," § 3.

WAIVER.

See "Estoppel."
Exemption of homestead, see "Homestead," § 2.
Of objections to parties, see "Parties," § 1.

WATERS AND WATER COURSES.

§ 1. **Public water supply.**
Where a water company has purchased the property, rights, contracts, privileges, and franchises of another company, and, with a city's consent, proceeded to carry out its predecessor's contract to supply the city with water, the obligations of the city and the new company are correlative, and the latter is as much required to furnish water to the city under the contract with the old company as the city is required to pay for it.
—City of Austin v. Bartholomew, 107 Fed. 349; Nalle v. City of Austin, Id.....46 C. C. A. 327

Austin City Charter, art. 6, § 7, authorizes the city "to construct waterworks; * * * to provide the city with water, * * * and to erect hydrants, fire plugs," etc.; and section 20 empowers the city "to provide for the prevention and extinguishment of fires," etc. *Held* to authorize it to rent hydrants of a water company for municipal purposes.
—City of Austin v. Bartholomew, 107 Fed. 349; Nalle v. City of Austin, Id.....46 C. C. A. 327

Where a city for more than eight years acquiesced to the fullest extent in the assignment by a water company of its rights and privileges under a contract with the city, and allowed the new company during such time to perform the contract of its assignor, it is too late for the city to question the legality of the assignment for the purpose of avoiding performance of the contract on its part.
—City of Austin v. Bartholomew, 107 Fed. 349; Nalle v. City of Austin, Id.....46 C. C. A. 327

The receiver of a water company is not entitled to claim on its behalf, from a city which it was to supply with water, payment for a specific number of hydrants, and at the same time demand payment for addi-

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tional hydrants which were to be furnished free on condition that the hydrants first referred to were paid for.

—City of Austin v. Bartholomew, 107 Fed. 349; Nalle v. City of Austin, Id.....46 C. C. A. 327

WAYS.

Public ways, see "Municipal Corporations," § 2.

WILLS.

See "Descent and Distribution"; "Executors and Administrators."

WITNESSES.

See "Evidence."

Credibility as question for jury, see "Trial," § 3.

Experts, see "Evidence," § 7.

§ 1. Examination.

A witness called by defendant in an action for libel charging plaintiff with robbing his employer represented plaintiff's employer during his employment, made his reports to him, saw the checks given to plaintiff, and audited statements made by plaintiff of his expenditures. With a book before him he was asked on cross-examination to refresh his recollection, and state what apparent balance, if any, plaintiff had in his hands, on a certain date, belonging to his employer. He answered that according to the book he had a balance which he specified. Thereupon motion was made to strike out the answer "on the ground that witness cannot refresh his recollection, as he says, 'according.'" *Held* that, the figures in the book being his own, made when he went over the accounts with plaintiff, and representing what he then believed was the correct balance, the answer was properly allowed to stand.

—Tribune Ass'n v. Follwell, 107 Fed. 646.....46 C. C. A. 526

Defendant was properly allowed to ask him on cross-examination whether he knew of a single dollar of his principal's money that plaintiff ever embezzled or stole.

—Tribune Ass'n v. Follwell, 107 Fed. 646.....46 C. C. A. 526

§ 2. Credibility, impeachment, contradiction, and corroboration.

Accused having tendered evidence of his good character relating to a period continuing to the time of the trial, the prosecution was properly permitted to contradict the same on cross-examination of a witness for accused, showing that he had previously been sent to the penitentiary for a different offense.

—Davis v. United States, 107 Fed. 753.....46 C. C. A. 619

In a contest between the receiver of a national bank and creditors of its deceased president as to the right to personalty transferred by the latter to the vice president by three several bills of sale, the creditors claimed the property under two of the bills, as having been executed for their security; and their claim was supported by the vice president, who was made a party to the cause, and claimed to be the president's surety as to the creditors in question. The receiver claimed under the third and earlier bill, which he averred was made in favor of the vice president, as trustee, to secure a large sum owed the bank by the president. To sustain the claim of the creditors, the vice president was called to prove the execution and delivery of the bills on which they relied, and the attending circumstances. *Held* that, the bill on which the receiver relied having been produced and identified on the cross-examination, it was competent for the receiver to inquire concerning its purpose, without making the

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vice president his own witness in any such sense as to be concluded by his statements, and hence the receiver was not precluded from thereafter showing admissions by the vice president in support of the receiver's claim, though contradicting statements made on the cross-examination. *Held*, further, that the admissions made by the vice president were competent as against the creditors, because they could only claim the fund in right of the vice president, in whose favor two of the bills of sale were executed, on the principle of subrogation.
—Fourth Nat. Bank v. Albaugh, 107 Fed. 819.....46 C. C. A. 655

WRITS.

See "Process."
Writ of error, see "Appeal and Error."
Writ of error in criminal prosecutions, see "Criminal Law," § 4.

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